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FEDERAL COMMUNICATIONS COMMISSION

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F.C.C. 73-201

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of ALABAMA MICROWAVE, INC. For Construction Permits in the Domestic Public Point-to-Point Microwave Radio Service for Establishment of Three New Stations at or Near Gadsden, Anniston, and Guntersville, Ala., and the Modification of One Existing Station, XRR71, at Huntsville, Ala.	Docket No. 18691 File Nos. 1481 through 1484-C1-P-70
NEWHOUSE ALABAMA MICROWAVE, INC. For Construction Permits in the Domestic Public Point-to-Point Microwave Radio Service for Establishment of the Three New Stations at or Near Birmingham, Pell City, and Anniston, Ala.	Docket No. 18692 File Nos. 147 through 149-C1-P-70

ORDER

(Adopted February 21, 1973; Released February 23, 1973)

BY THE COMMISSION:

1. The Commission has before it for consideration: (a) an application for review of the Review Board's Decision herein (34 FCC 2d 660, released May 3, 1972) filed June 2, 1972, by Newhouse Alabama Microwave, Inc., (b) Comments filed June 26, 1972, by the Chief, Common Carrier Bureau, (c) Opposition filed June 26, 1972, by Alabama Microwave, Inc., (d) Reply filed July 17, 1972, by Newhouse Alabama Microwave, Inc., (e) Petition for leave to file a supplemental statement filed July 21, 1972, by Alabama Microwave, Inc., (f) and a statement filed July 28, 1972, by Newhouse Alabama Microwave, Inc.

2. IT IS ORDERED:

(a) That the petition for leave to file a supplemental statement filed July 21, 1972, by Alabama Microwave, Inc. IS GRANTED and the supplemental statement attached to such petition IS ACCEPTED;

(b) That the above-described application for review filed June 2, 1972 by Newhouse Alabama Microwave, Inc. IS GRANTED;

(c) That oral argument herein IS SCHEDULED before the Commission *en banc* on April 3, 1973, at 9:30 a.m.

109-029—73——1

(d) That subject to the filing of a written notice of intention to appear and participate within five days after the release of this Order, the parties ARE AUTHORIZED to present oral argument as follows:

Newhouse Alabama Microwave, Inc., Twenty Minutes (20).
Chief, Common Carrier Bureau, Twenty Minutes (20).
Alabama Microwave, Inc., Thirty Minutes (30).

(e) That Newhouse Alabama Microwave, Inc. and the Chief, Common Carrier Bureau may reserve a part of their time for rebuttal.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-186

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMERICAN TELEPHONE & TELEGRAPH CO. (A.T. & T.) Revisions of Tariff FCC No. 260, Private Line Service, Transmittal No. 11610	Docket No. 19691

MEMORANDUM OPINION AND ORDER

(Adopted February 14, 1973; Released February 22, 1973)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE, JOHNSON AND WILEY CONCURRING IN THE RESULT; COMMISSIONER REID ABSENT.

1. On November 13, 1972, revised tariff schedules were filed by AT&T under Transmittal Letter No. 11610, dated November 13, 1972, to become effective February 15, 1973. These revised schedules apply to voice grade private line services which are not connected to the switched telephone networks, i.e. voice grade private line services not connected to local or toll central office lines or Wide Area Telephone Service (WATS) access lines (hereafter referred to as "unmixed" private line service).

2. More specifically, the revisions would permit the carrier to engage in certain new practices not now followed with respect to those cases where customers desire to provide their own customer-provided terminal equipment or communications systems and to connect such facilities by direct electrical connection to the voice grade private line facilities of the carrier. The new proposed practices are: where such direct connections are made by the customers, the telephone company (a) will make the necessary arrangements on the customer's premises to protect against "hazardous voltages" and the "harmful effects of longitudinal imbalance" and (b) will make the necessary arrangements either at its central offices or on the customer's premises to protect against "signal power overload."

3. At the present time, and for many years past, the practices of the AT&T have been to permit such direct connections to unmixed private line services without any specific arrangements being made by the carrier to protect against hazardous voltages, longitudinal imbalance or signal power overload. The practices have been different, however, with respect to "mixed" voice grade private line services (i.e. private line services that are connected to the switched toll and exchange network). In mixed private line services the practices are the same as in all switched services, including interstate message toll and WATS services, that is, all customer-provided facilities are required to be connected through one or more carrier-provided protec-

tive couplers for which extra installation and monthly charges are imposed on the customer by the carrier. In these revised tariffs for unmixed private line services AT&T proposes to make no extra charge to customers for the protective "arrangements."

4. AT&T's basic justification for the revised tariffs is that all of its services, whether private line or switched, share in the use of common facilities in varying degrees such as local distribution cable, carrier systems, main frames in the central offices, and switching equipment and that, accordingly, all of its services, whether switched or private line and whether mixed or unmixed, have the same need for protection from the types of harm referred to above, that is, from hazardous voltages, line imbalance, and signal overload.

5. These revised tariff schedules are significant modifications of tariff proposals that were originally filed by AT&T in March, 1969 which never became effective and which were withdrawn in November, 1972 in favor of the instant proposal. As first filed, AT&T proposed to require separate "couplers" or "interfaces" in all cases of direct connection of customer facilities to unmixed private lines and to charge the customer for such couplers which could be supplied only by the telephone company. Later, in June, 1971, AT&T modified its original proposal and filed tariffs proposing that protective arrangements would be built into the "service terminal" of its unmixed private line facilities and that no extra charges would be imposed by AT&T "at that time" for such protective facilities. Many protests were lodged against this latter proposal and informal meetings were conducted by the Commission with interested parties to determine whether differences among the parties could be resolved. The principal objections were that (a) there was no need for such protective arrangements in the light of the historic omission thereof in the past and the alleged failure of the carriers to demonstrate any serious likelihood of harm from such direct connection; (b) building such arrangements into the "service terminal" facilities would seriously degrade and limit the customer's use of the service; (c) such degradation limitations would be anti-competitive in that, among other things, it would mean that no such degradation and limitation would be imposed upon customers who obtain their terminal devices or systems from the carrier and the effect would be to promote the sale of AT&T facilities; (d) requiring such protective facilities in all cases was an unwarranted and unlawful *a priori* assumption of harm from each and every item of customer-provided equipment; (e) no provision was made for such protective arrangements to be supplied by any source other than the carrier; and (f) customers ultimately would be required to pay extra charges for these protective arrangements and that the imposition of such charges for an entrenched program would further aggravate the anti-competitive features of the proposal. AT&T deferred the effective date of this particular proposal at our request until November, 1972 when, as heretofore stated, AT&T filed the tariff revisions before us.

6. Three of the eight parties that filed objections to the June, 1971 proposal of AT&T have filed statements with us concerning the revision. The Computer Time Sharing Service Section (CTSS) of the Association of Data Processing Service Organization (ADAPSO) and

the Independent Data Communications Manufacturers Association, Inc. (IDCMA) have filed letters indicating in substance that the new revision reduces the burden on the customer who does not necessarily want or need to purchase equipment from AT&T and that they will not oppose the revised tariff at this time. Both of these parties continue to express reservations about the need for the proposed protective arrangements and both state that the revised tariff is not a final solution to the alleged discrimination against users of non-telephone company equipment. Each indicates that the better solution is for technical criteria to be prescribed for such protective arrangemnts so that persons other than the telephone company may supply them, or that the carrier provide such protective arrangements in all of their private line services, irrespective of whether connected with telephone company or non-telephone company equipment, so that all customers would then be furnished the same circuit facilities by the carrier.

7. However, on February 1, 1973, MCI filed a Petition for Rejection or Suspension of the new revised tariff and this petition is now before us for action. MCI requests that we either reject or suspend the tariff filing, or failing either of these actions, to rule that:

(a) The new filing does not apply to the interconnection of the systems of specialized carriers with the private lines of AT&T; and

(b) Nothing in the Commission's action is intended to immunize AT&T from possible liability under the antitrust laws.

8. MCI makes these principal allegations against the new filing; (a) AT&T has still not demonstrated any need for the proposed protective arrangements; (b) AT&T has still not disclosed full information as to the nature of the devices so that others can manufacture them or obviate the claimed need for them; (c) AT&T still would impair fair competition; (d) AT&T has not adequately explained the costs of its devices nor has it justified its failure to charge for them or its proposal to spread all costs thereof among all users; (e) AT&T still refuses to take the proper course—that of specifying reasonable criteria to be met by those wishing to interconnect with the telephone system; and (f) the tariff does not clearly state that the new practices do not apply to interconnection with facilities of other carriers.

9. On February 9, 1973 AT&T submitted its reply to MCI's petition and objects to the petition on both procedural and substantive grounds. AT&T is correct in contending that MCI's petition violates Section 1.44(a) of our rules by combining into a single pleading requests for action delegated to the Chief, Common Carrier Bureau (rejection) with action reserved to the Commission (suspension). 47 CFR 1.44(a) We would be warranted, therefore, in refusing to consider MCI's petition because of the violation of our rules. However, we believe that certain questions discussed in MCI's petition and AT&T's reply [1] are of sufficient importance to be considered by us on our motion in the exercise of our discretion under the suspension powers given to us by Section 204 of the Act. 47 U.S.C. 204.

[1] We note that AT&T's reply, although not in violation of our rules, was not actually filed "within 3 days" after service of MCI's petition on AT&T as contemplated by 47 C.F.R. 1.773.

10. We agree with MCI that AT&T has not made a persuasive showing that there is a need for AT&T to install protective equipment in all cases where customer equipment is connected directly to unmixed voice grade private line facilities. In its reply, AT&T continues to assert that there is a need for protective equipment on private line services because all services share common facilities, such as local distribution cables, carrier systems, and main frames and all are subject to harmful voltages, line imbalance; and excessive signal levels; and that the National Academy of Sciences concluded that "uncontrolled interconnection" could cause these types of harm to private line as well as other services. However, as MCI points out, AT&T proposes under its tariffs to install such protective equipment only with respect to services installed on and after February 15, 1973 and then only with respect to services for those customers who use non-telephone equipment. Thus, on and after February 15, 1973 AT&T does not propose to install such protective facilities for customers who use telephone company equipment even though such terminal equipment may be similar to the equipment that the customer provides and equally likely to cause the same kinds of alleged harm to the carrier facilities. Moreover, AT&T does not propose to install such protective equipment for any services provided to any customers that are in service on February 14, 1973 even though those services presumably could be subject to the same types of harm. It would appear that, if there is real danger of such harm, all services should be protected.

11. With respect to MCI's assertion that AT&T has not deemed it necessary to install such protective equipment in the past for any customers connecting directly to unmixed voice grade private line facilities, AT&T's reply is that, although there has been "past interference" it cannot "be readily quantified or specificially identified and recorded," and that "past experience in this instance is not a reliable basis upon which to predicate the need for protection in the future." However, AT&T makes no persuasive factual or other showing that experience is not a reliable basis for this purpose. In view of the foregoing, we believe that substantial questions are raised as to the reasonableness of AT&T's proposal to install protective equipment only with respect to some customers and not others as the new filing proposes to do.

12. As to MCI's claim that AT&T should not be given a monopoly in the provision of the proposed "protective equipment," AT&T's reply is that these particular facilities are part of AT&T's basic service offerings and are not in the category of "terminal devices" open to competition. However, this assertion by AT&T appears to be inconsistent with its proposal to install protective equipment *only* with respect to facilities provided to certain customers to the exclusion of many, if not most, other customers using unmixed voice grade facilities. We question, therefore, whether it is reasonable to consider such equipment as part of AT&T's "basic service offerings." Thus, a valid question is raised as to whether, in lieu of giving AT&T a monopoly in this area, there should not be a standards program by which the customer or persons other than AT&T could provide such protective

arrangements to the extent that such equipment is needed to prevent harm.

13. As heretofore stated, MCI challenges the ratemaking decision of AT&T (a) to provide these protective arrangements without extra or separate charges to the customers and (b) to spread the costs thereof among all users, including message toll users. This challenge is answered by AT&T primarily on the grounds that the costs are likely to be *de minimus* but that, if it should develop that costs are substantial, AT&T would probably file tariffs setting up separate charges therefore which AT&T would appropriately justify at that time. We believe that, at least in principle, MCI raises a valid question as to the propriety of AT&T's ratemaking principles applied in this case. As to MCI's request that it be made clear that the new tariff revision does not apply to MCI's own carrier-to-carrier interconnections with AT&T's loops, the reply of AT&T contends that it is already clear that the new revision does not so apply and we agree.

14. In view of the foregoing discussion, we believe that substantial questions are raised as to the lawfulness of AT&T's tariff revisions that warrant our acting on our own motion and designating such revisions for hearing and suspending the effectiveness thereof for the maximum 3-month period provided for in Section 204 of the Act.

15. Accordingly, in view of the foregoing considerations, IT IS ORDERED, That, pursuant to the provisions of Sections 4(i), 4(j), 201, 202, 203, 204, 205, and 403 of the Communications Act of 1934, as amended, an investigation is instituted into the lawfulness of revisions in AT&T's Tariff FCC No. 260 submitted with Transmittal No. 11610 including cancellations, amendments or reissues thereof;

16. IT IS FURTHER ORDERED, That, pursuant to the provisions of Section 204 of the Communications Act, such revisions are HEREBY SUSPENDED until May 15, 1973, and AT&T shall make no changes in said schedules of charges during the pendency of this proceeding without prior approval of the Commission;

17. IT IS FURTHER ORDERED, That, without in any way limiting the scope of the investigation, it shall include consideration of the following:

(1) Whether the classifications, practices, and regulations published in the aforesaid tariff revisions are or will be unjust and unreasonable within the meaning of Section 201(b) of the act;

(2) Whether such classifications, practices, and regulations will, or could be applied to, subject any person or class of persons to unjust or unreasonable discrimination or give any undue or unreasonable preference or prejudice to any person, class of persons, or locality, within the meaning of Section 202(a) of the act;

(3) If any of such classifications, practices, and regulations are found to be unlawful, whether the Commission should prescribe classifications, practices, and regulations for the service governed by the tariffs, and if so, what should be prescribed.

18. IT IS FURTHER ORDERED, That, a hearing be held in this proceeding at the Commission's offices in Washington, D.C. at a time to be specified; and that the Administrative Law Judge to be designated to preside at the hearing shall certify the record, without prep-

aration of an initial or recommended decision, and the Chief of the Common Carrier Bureau shall thereafter issue a recommended decision which shall be subject to the submittal of exceptions and requests for oral argument as provided in 47 CFR 1.276 and 1.277, after which the Commission shall issue its decision as provided in 47 CFR 1.282; and

19. IT IS FURTHER ORDERED, That, AT&T and the associated Bell System operating companies ARE MADE parties respondents and MCI IS GRANTED leave to intervene upon filing a notice of intention to appear and participate within 20 days of the release date of this order.

20. IT IS FURTHER ORDERED, That, MCI's petition IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-43

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMERICAN TELEPHONE & TELEGRAPH CO.— LONG LINES DEPARTMENT (A.T. & T.) Revisions of Wide Area Telephone (WATS), Tariff F.C.C. No. 259 and Private Line Service (PLS), Tariff F.C.C. No. 260 and THE WESTERN UNION TELEGRAPH CO. (WESTERN UNION). Revisions of Tariff F.C.C. No. 254	Docket No. 19419

MEMORANDUM OPINION AND ORDER

(Adopted January 10, 1973; Released January 12, 1973)

BY THE COMMISSION: COMMISSIONERS JOHNSON AND REID DISSENTING; COMMISSIONER HOOKS ABSENT.

A. BACKGROUND

1. In a Memorandum Opinion and Order released February 7, 1972 in this docket, we suspended and instituted an investigation into the lawfulness of certain tariff revisions filed by AT&T in the above-noted interstate WATS and PLS tariffs (33 F.C.C. 2d 518). These revisions were originally scheduled to go into effect on February 4, 1972. However, we suspended them until May 4, 1972 and AT&T postponed the effective date still further until July 4, 1972.

2. As originally filed these tariffs included (a) substantial reductions in existing interstate charges for AT&T-provided "Dataphone" sets that are offered to customers who wish to connect their own data terminal facilities to the switched telephone network (either through WATS or PLS facilities); (b) establishment of new interstate charges for an AT&T-provided "automatic data access arrangement" that is also offered to customers who wish to connect their own data facilities to the switched telephone network; (c) changes in existing interstate tariff regulations to permit more flexible use of AT&T-provided "multi-channel data station equipment" offered to customers who wish to use such channel-deriving equipment in combination with voice-grade data channels obtained from the telephone company; and (d) establishment of new interstate rates for an additional category of "Dataphone" sets suitable for combined sending and receiving and for handling data at higher speeds. Each of these AT&T-provided facilities are competitive, in varying degrees, with similar equipment or

facilities offered by independent manufacturers and suppliers or other common carriers. In its petition IDCMA [1] made a number of allegations (which we summarize in paragraph 3 of our February 7, 1972 action, 33 F.C.C. 2d, at page 519), to the effect that these competitive offerings of the Bell System in its private line services were being subsidized by the monopoly services of Bell, and were anti-competitive vis-a-vis members of IDCMA who supplied similar facilities to the public in competition with Bell. Based upon these allegations, we suspended the original AT&T tariffs for the full 3-month period provided for in Section 204 of the Act and we stated that we would consider particularly the question of the lawfulness of these tariff schedules in light of their potentially anti-competitive effects (33 F.C.C. 2d, at page 520).

3. Before the original tariff schedules could go into effect AT&T applied for special permission to file revised tariffs in substitution for the original tariffs. The stated purpose of AT&T was to ameliorate the alleged anti-competitive effects of the original filing and to expedite the resolution of the issues in the hearing. Based upon alleged "changed circumstances" subsequent to the filing of the original tariffs, AT&T proposed to establish monthly rates for the "Dataphone" sets and channel-deriving equipment higher than those originally proposed and to establish monthly rates for the automatic data access arrangement lower than those originally proposed.

4. We granted AT&T's request and the substitute tariffs were filed and became effective July 3, 1972 thereby cancelling the originally filed tariffs. By virtue of language in our Memorandum Opinion and Order of February 7, 1972, the substitute tariff pages were automatically set for hearing in this docket in lieu of the original tariffs (33 F.C.C. 2d, p. 520). Inasmuch as it appeared to us that the revised tariffs might possibly ameliorate the alleged anti-competitive features of the original filing, we invited interested parties to submit comments and reply comments on the new submission. Further, by Memorandum Opinion and Order of June 26, 1972 we ordered the deferral of hearings herein until we could consider such comments (36 F.C.C. 2d 498). On about July 26, 1972 IDCMA submitted its comments in the form of a "Petition to Reject or Suspend." Although IDCMA agreed that the revisions made by AT&T in the substitute rates were in the proper direction, IDCMA contended that the revisions were not sufficient in degree at least and that the revised rates continued to be based upon cross-subsidization by the monopoly services of Bell and were anti-competitive as to the independent suppliers of competitive data devises supplied by members of IDCMA. AT&T opposed IDCMA's petition to reject or suspend [2] and urged that this proceeding be terminated. Western Union also filed comments on AT&T's substitute tariffs contending that AT&T's revised charges for its Data sets and for Multi-Channel Equipment would have a significant impact on Western Union's competitive service offerings and that AT&T's charges for such services are unduly discriminatory as between AT&T's own customers.

5. In addition to submitting its comments on the AT&T substitute tariffs, Western Union filed its own tariff schedules effective August 10,

[1] Independent Data Communications Manufacturers Association, Inc.

1972 matching the AT&T rates for certain of the Data sets offered by AT&T. On or about August 29, 1972 IDCMA filed a "Petition to Reject or Suspend" [2] the Western Union tariffs on the same basis as it opposed the revised AT&T rates.

6. On November 24, 1972, AT&T filed further revised PLS tariff schedules to become effective December 24, 1972 establishing a new rate for the first time in its interstate PLS tariffs applicable to a Series 200 Data-Phone Data Set (Type 208). This device provides for combined sending and receiving transmission and is suitable for conditioning signals at a rate of 4800 bits per second. Competitive data sets are offered by certain members of IDCMA. At our request the effective date of this tariff was postponed from December 24, 1972 until January 14, 1973. A timely Petition to Suspend was filed by IDCMA on December 29, 1972. An opposition thereto was filed by AT&T on January 9, 1973.

B. DISCUSSION

7. As indicated in the foregoing, this proceeding was commenced in February 1972 (a) to investigate the lawfulness of the charges of AT&T for providing certain data service facilities that are competitive with similar facilities available from alternative suppliers and (b) to determine whether and to what extent we should prescribe new tariffs if we should find any such unlawfulness (33 FCC 2d 518). However, the proceeding has been temporarily stayed by us pending further order (36 FCC 2d 498).

8. The questions that are now properly before us for decision are (1) whether we should terminate the proceeding herein as AT&T has urged us to do over the opposition of IDCMA; (2) whether, if we do not terminate, we should also set Western Union's matching rates for hearing in this proceeding as requested by IDCMA; and (3) whether we should suspend and set for hearing in this proceeding the recently filed interstate rate of AT&T for the 208 Data set, which IDCMA has requested us to do.

9. With respect to the question of whether we should terminate this proceeding, we are of the opinion that the substitute rates now under investigation continue to raise essentially the same cross-subsidization and anti-competitive questions that were raised by the original tariffs and which we summarized in our original action herein. (See 33 F.C.C. 2d, 518). For example, the fact that the substitute tariff reduces the prior monthly rate for AT&T's 200 Data set from $72.00 to $55.00 a month whereas the original tariff filing would have reduced the rate from $72.00 to $47.00 a month does not warrant our finding that the substitute rates are now free of any substantial questions of lawfulness. Accordingly, we conclude that the hearing herein on the original issues of lawfulness under Section 201(b) and 202(a) of the Act should proceed without any further undue delay, particularly in view of IDCMA's claims that its members are being adversely affected by

[2] We have not considered IDCMA's petition insofar as it requests "rejection" or "suspension" of tariffs for the reasons that (a) the pleading violated Section 1.44 of our Rules prohibiting joinder of requests for action delegated to the staff (rejection of tariffs) and for action by the Commission (suspension of tariffs) and (b) it violated Section 1.773 of our Rules requiring suspension requests to be filed at least 14 days before the effective date of the tariff in question.

the competitive AT&T rates and that IDCMA is entitled to a prompt hearing and resolution of its contentions. As to the second question, we agree with IDCMA that the matching rates of Western Union also raise substantially the same questions of lawfulness as do the AT&T rates. We shall therefore set the Western Union rates for hearing in this proceeding.

10. With regard to the third question, IDCMA contends in its petition to suspend and investigate the recently filed rate of AT&T for the competitive 208 Data set, that this new filing raises all of the same questions of lawfulness that prompted the Commission to suspend for the full statutory period and set for hearing the original tariffs for the other AT&T-provided data facilities involved in this proceeding; that AT&T expressly admits that its pricing of the competitive 208 Data set is based upon alleged "incremental costs" which the Commission has not as yet approved in principle and which is at issue in pending docket 18128; [3] that, in any event, AT&T has not allocated all of the carriers' costs that should be allocated to this Data set in fixing the rates; and that members of IDCMA that supply competitive Data sets are and will be adversely and unlawfully affected by AT&T's proposed rates. We believe that IDCMA raises substantial questions of lawfulness that warrant our setting the new 208 Data rates for hearing under the issues herein. Moreover, consistent with our original action on the other competitive rates in issue in this case, we shall suspend the effectiveness of the new charges for the maximum 3-month period specified in Section 204 of the Act. However, since AT&T, at our request, postponed the original effective date of the tariff from December 24, 1972 to January 14, 1973, we shall suspend the tariff for 3 months from the former, rather than the latter, date.

11. IDCMA requests further alternative relief in the form of an order that AT&T be required to give written notification to customers who may order AT&T's 208 Data set, that questions of lawfulness have been raised as to the rates therefor and that such rates are under investigation in this proceeding and are subject to being changed by the Commission. This is an entirely appropriate request and we shall order AT&T to supply such notice in the form and manner prescribed by the Chief, Common Carrier Bureau.

12. Accordingly, IT IS ORDERED, That pursuant to Sections 201, 202, 203, 204, 205, and 403 of the Communications Act of 1934, as amended, an investigation is instituted herein into the lawfulness of the tariff schedules filed (a) by AT&T with its Transmittal No. 11618, effective January 14, 1973, and (b) by Western Union under its Transmittal No. 6772; including any cancellations, amendments or reissues thereto; and that the issues heretofore specified herein shall also apply to such tariff schedules;

13. IT IS FURTHER ORDERED, That pursuant to the provisions of Section 204 of the Act, the effectiveness of the tariff schedules filed by AT&T with Transmittal No. 11618 ARE HEREBY SUSPENDED until March 24, 1973 and that AT&T shall provide the notice to customers as set forth in paragraph 11 hereof;

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[3] In its reply of January 9, 1973 AT&T also submitted alternative calculations of its costs on the basis of embedded costs which indicates costs slightly less than the "incremental" costs.

14. IT IS FURTHER ORDERED, That paragraph 5 of our order herein of June 26, 1972, 36 F.C.C. 2d, at page 449, staying the proceedings herein, IS VACATED, and the hearing in this proceeding shall commence at the Commission offices in Washington, D.C. at a time to be specified by the presiding Administrative Law Judge; and that such Administrative Law Judge shall certify the record without preparation of an initial or recommended decision, and the Chief of the Common Carrier Bureau shall thereafter issue a recommended decision which shall be subject to the submittal of exceptions and requests for oral argument as provided in 47 C.F.R. 1.276 and 1.277, after which the Commission shall issue its decision as provided in 47 C.F.R. 1.282;

15. IT IS FURTHER ORDERED, That IDCMA's Petition To Suspend IS GRANTED;

16. IT IS FURTHER ORDERED, That the Western Union Telegraph Company is named Party Respondent.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73–187

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re: BIG VALLEY CABLEVISION, INC., SAN JOAQUIN COUNTY, CALIF. For Certificate of Compliance	CAC–278 CA430

MEMORANDUM OPINION AND ORDER

(Adopted February 14, 1973; Released February 23, 1973)

BY THE COMMISSION: COMMISSIONERS JOHNSON, H. REX LEE AND WILEY CONCURRING IN THE RESULT; COMMISSIONER REID ABSENT.

1. On April 28, 1972, Big Valley Cablevision, Inc., filed an application (CAC–278) for a certificate of compliance to operate a cable television system in certain unincorporated areas of San Joaquin County, California (located in the 25th television market). Big Valley intends to commence operation with the following California television signals: KOVR (ABC), Stockton; KCRA–TV (NBC), KXTV (CBS), KTXL (Ind.), KVIE (Educ.), and KMUV–TV (Ind., c.p.), Sacramento; KLOC–TV (Ind.), Modesto; KQED (Educ.), KBHK–TV (Ind.) and KEMO–TV (For. Lang.), San Francisco; and KTVU (Ind.), Oakland. Big Valley's application is opposed by Great Western Broadcasting Corp., licensee of Television Broadcast Station KXTV, Sacramento, California; Central California Educational Television, licensee of Television Broadcast Station KVIE, Sacramento, California; and KLOC Broadcasting Co., licensee of Station KLOC–TV, Modesto, California.

2. Central California Educational Television objects only to the proposed carriage of Station KQED for the following reasons: (a) Big Valley's franchise area is in the core of KVIE's coverage area where it obtains financial support; (b) KQED and KVIE have agreed to keep out of each other's core coverage area and Big Valley's franchise area is encompassed by KVIE's predicted Grade A contour; and (c) because KQED's program schedule duplicates a substantial portion of KVIE's schedule, importation will inevitably erode local support for KVIE among Big Valley's cable subscribers. These arguments must be rejected. Station KQED places a predicted Grade B contour over Big Valley's franchise area and KVIE's petition has not presented factual evidence that persuades us that a departure from our general rule is appropriate. Par. 12, *Reconsideration of Cable Television Report and Order*, FCC 72–530, 36 FCC 2d 326, 330. And we note that this Commission does not give effect to private agreements between educational broadcasters to divide their audiences. E.g. *Information Transfer, Inc.*, FCC 72–1094, ——FCC 2d——. However,

we note that Station KVIE is entitled to simultaneous network program exclusivity vis-a-vis Station KQED, pursuant to Section 76.91 of the Commission's Rules.

3. Great Western and KLOC Broadcasting object to carriage of KEMO–TV. Great Western argues that KEMO–TV is not a predominantly foreign language station so that its carriage by Big Valley is not consistent with Section 76.61(e) of the Commission's Rules,[1] and, in the alternative, that if the Commission determines that KEMO–TV is a foreign language station, Big Valley should be permitted to carry only KEMO–TV's non-English programming. KLOC Broadcasting agrees that KEMO–TV is a foreign language station but argues that its carriage would have serious economic impact on KLOC–TV which broadcasts virtually all Spanish language programming from 5 P.M. to sign-off (there are a few small segments of Portuguese language programming). It appears from the information supplied that KEMO–TV is a predominantly non-English language station within the meaning of Section 76.61(e) of the Rules.[2] KLOC Broadcasting has not presented a factual showing to demonstrate economic impact from Big Valley's carriage of KEMO–TV.[3] Nor has Great Western persuaded us to vary the clear language of Section 76.61(e) of the Rules to limit KEMO–TV's carriage to only non-English language programs.

4. Great Western argues that Big Valley's franchise (awarded April 23, 1968) is inconsistent with Section 76.31 of the Rules on the following grounds: (a) it contains no showing that it was awarded after public proceedings; (b) the 30 year duration exceeds the 15 year maximum; (c) there is no provision for public participation in the process of changing rates, and it does not provide for incorporation or amendment into the franchise of modifications resulting from Commission amendment of Section 76.31; and (d) the 7% franchise fee is in excess of the Commission's 3% limit. Great Western next contends that Big Valley has failed to explain in detail its plans for availability and administration of its access channels. Finally, Great Western objects to a certificate grant unless conditioned upon the simultaneous and syndicated program exclusivity requirements of the Commission rules.

5. We rule on Great Western's objections to Big Valley's franchise as follows: (a) the resolution awarding Big Valley a franchise indicates that the franchise was awarded after solicitation of bids through

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[1] Section 76.61(e) of the Rules provides that, "In addition to the television broadcast signals carried pursuant to paragraphs (a) through (d) of this section, any such cable television system may carry any television stations broadcasting predominantly in a non-English language."

[2] In its most recent application, the licensee of KEMO–TV represented that, "Applicant expects to operate Station KEMO–TV dominantly as a foreign language facility. Each foreign language personality will have the responsibility of gathering and presenting news pertinent to his particular following. For example the Japanese broadcaster will gather news items of interest to the Japanese community, the Portuguese man will gather items of interest to the Portuguese community, etc." (File No. BALCT–455.) Moreover, it appears that the only English language programming on the station is presently carried outside prime time from 11 P.M. to 1:00 A.M., Monday through Friday. This is clearly a *de minimis* amount which falls within our rule.

[3] Although KLOC–TV places a predicted Grade B contour over portions of San Joaquin County, it is not clear on the the record that it provides a predicted contour over Big Valley's proposed system. See also Par. 23, *Reconsideration of Cable Television Report and Order*, FCC 72–530, 36 FCC 2d 326, 334; *Mickelson Media, Inc.*, FCC 73–119, — FCC 2d —.

advertisement in a newspaper of general circulation and careful consideration in a public proceeding by the County Board of Supervisors; (b) although the 30 year franchise clearly exceeds our requirement in Section 76.31(a)(3) of the Commission's Rules, that fact alone need not preclude us from considering whether this franchise is in substantial compliance with our rules because in any event the franchise must fully conform to our standards by March 31, 1977; (c) subscriber charges have been set by the Board of Supervisors and the Board's approval is required for any increase (charges cannot be raised for the first year of operation); and (d) nor is the franchise fee such a distortion of our rules that rectification through renegotiation prior to March 31, 1977, is required. Consequently, it appears that the franchise meets the substantial compliance test, and that the public interest would not be served by requiring Big Valley to renegotiate now with the franchisor. E.g. *CATV of Rockford, Inc.*, FCC 72–1005, 38 FCC 2d 10. Big Valley's application adequately explains how it will meet the requirement for availability and administration of access and other nonbroadcast cable services. E.g. *Viking Media Corporation*, FCC 72–875, 37 FCC 2d 605, 606. With regard to the program and syndicated exclusivity requirements of Section 76.93 and 76.151 of the Rules, all cable systems are expected to comply with these requirements; however, the certificating process does not contain any requirement that cable systems affirmatively agree to comply with these rules. Further, Big Valley's reply indicates that it intends to comply with all Commission regulations and we expect Big Valley to do so.

In view of the foregoing, the Commission finds that a grant of the above-captioned application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Application For Certification" (CAC–278) filed April 28, 1972, by Big Valley Cablevision, Inc., IS GRANTED, and an appropriate certificate of compliance will be issued.

IT IS FURTHER ORDERED, That the "Objection Of Great Western Broadcasting Corp. Pursuant To Section 76.17" filed June 12, 1972, by Great Western Broadcasting Corp., licensee of Television Broadcast Station KXTV, Sacramento, California, IS DENIED.

IT IS FURTHER ORDERED, That the "Objections To Carriage and Request For Special Relief" filed June 12, 1972, by Central California Educational Television, licensee of Television Broadcast Station KVIE, Sacramento, California, IS DENIED.

IT IS FURTHER ORDERED, That the "Partial Opposition To Application For Certification" filed July 12, 1972, by KLOC Broadcasting Co., licensee of Station KLOC–TV, Modesto, California, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73–220

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 73 OF THE COMMISSION'S RULES, REGARDING AM STATION ASSIGNMENT STANDARDS AND THE RELATIONSHIP BETWEEN THE AM AND FM BROADCAST SERVICES	Docket No. 18651

REPORT AND ORDER

(Adopted February 21, 1973; Released February 28, 1973)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT; COMMISSIONER JOHNSON DISSENTING AND ISSUING A STATEMENT; COMMISSIONER WILEY ISSUING A SEPARATE STATEMENT.

1. This matter concerns the adoption of new rules to govern the assignment of standard broadcast, or "AM" facilities, both new stations and major changes in existing facilities. The proceeding was begun by Notice of Proposed Rule Making and Memorandum Opinion and Order adopted September 4, 1969, FCC 69–960, 34 F.R. 14384 (September 13, 1969), 17 R.R. 2d 1524. Previously, in July 1968, a "freeze" had been imposed on the acceptance of applications for new AM stations and major changes, pending the formulation, proposal and adoption of rules to govern this service in the future.[1] Comments and reply comments in response to the Notice were filed until early April 1970.

I. CONSIDERATIONS UNDERLYING THE "FREEZE" AND NOTICE PROPOSAL

2. The 1968 "freeze" Report and Order expressed in substance the following considerations: since the adoption of new and somewhat more restrictive rules in 1964 (Docket 15084), applications have continued to flow in, and, while they do not present problems of degradation of existing service through interference (one of the important objectives of the Docket 15084 was to adopt rules under which such degradation would be minimized), stations authorized pursuant to these rules have been less than successful in improving AM service

[1] Report and Order adopted July 18, 1968, FCC 68–739, 33 F.R. 10343, 13 R.R. 2d 1667. The "freeze" applied to all new and major change applications except change applications required by circumstances beyond the applicant's control (e.g., inability to continue at its present transmitter site), applications which are mutually exclusive with AM renewal applications, applications necessary to comply with international commitments, and applications for Class IV power increases where new international agreements make them possible (the latter provision was relaxed somewhat in 1969 along with the Notice). The "freeze" has been waived in a few cases.

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generally in two important respects: reduction of "unserved area" [2] and provision of first local outlets in communities of significant size (while a majority of the stations being authorized as of mid 1968 were first stations, the size of places to which they were assigned was quite small, with a median population of 2,850). Also, since virtually all of the applications recently granted were for daytime-only facilities they do nothing to improve service at night, where the really substantial unserved area exists. The Report and Order stated that this situation necessitated a study to determine whether there is still a significant national need for new AM stations or for major changes in existing stations, except in underserved areas, whether the remaining frequency space should be conserved for developing areas or to eradicate "unserved area", whether any future allocation system should view AM and FM as a single aural service, and whether the traditional "demand" basis of AM assignments is an efficient use of spectrum space. Since a continuing flood of applications would frustrate the objectives of the forthcoming rule making, on these basic questions, the "freeze" was adopted.

3. The September 1969 Notice herein expressed these concepts in more concrete form. A quite restrictive rule was proposed, which would have prohibited the filing of applications for new stations unless the proposed operation would provide a first primary aural service to 25% of the area or population within the proposed primary service contour, and, if the application were for changed facilities, the area or population for which the station provided the only service would be increased. In determining the extent of present aural service, *signals from existing FM stations* of 1 mv/m or greater would be taken into account.[3] Also, a test of *FM channel availability* would be included with respect to applications for new AM stations or new nighttime facilities (though not for changes in facilities on the same frequency): the AM application would not be accepted if there is available in the community an FM channel which the applicant could use and achieve substantially the same coverage of unserved area. This would include unoccupied FM channels assigned to the community in the FM Table of Assignments (Section 73.202 of the Rules), unoccupied and available for use in the community because of assignment at a nearby community (Section 73.203(b), the "10-mile" or "15-mile" rule), or susceptible of assignment in a reasonably simple rule-making proceeding involving no other changes in the Table.[4]

4. It was recognized that these very restrictive tests would sharply curtail the flow of applications, and indeed, this was one of the ex-

[2] The term "unserved" where used herein means area or population not receiving AM primary service, daytime or nighttime as the case may be. The term "white area", used traditionally and in the Notice to express this concept, has been confusing at times, and therefore is not used herein, "unserved area" meaning the same thing. We are retaining the traditional term "gray" to refer to area or population receiving only one primary service, since the only other likely expression, "underserved", is not sufficiently precise.

[3] The proposed rule itself would not have included in this criterion service from noncommercial educational stations, although comments on this were invited. The 25% "unserved area" test would relate to daytime area where the AM application is for daytime facilities, either daytime or nighttime area where the application is for a new Class IV station, and otherwise to nighttime area.

[4] Thus, the criteria involving FM actually were two separate tests: the present existence of FM service, and the availability of an unoccupied FM channel. Some commenting parties confused the two, as discussed below.

press purposes of the proposal: to prevent the large-scale depletion of the limited AM spectrum space remaining until a more near optimum plan for utilizing it can be arrived at. It was emphasized (Notice, para. 29) that the proposed rules "are not necessarily those which will govern the acceptance of applications for new and increased AM facilities for the indefinite future", but their adoption would give the Commission time to evaluate the over-all picture of aural development and to stimulate FM, with a further look at these developments in a few years. Meantime, we would authorize only stations clearly designed to improve service substantially.

5. The Notice also emphasized certain other considerations, including the importance of stimulating FM development. It was stated that FM provides a superior service in a number of ways—fulltime as opposed to the daytime-only service contemplated by the great majority of AM applications, usually a wider and more reliable service than a nighttime AM operation will provide, a service otherwise technically superior, with stereo and SCA potential—as well as being cheaper for the Commission to authorize and, except as compared to Class IV stations, cheaper for applicants to design and construct (AM directional antennas are expensive to design, evaluate, build and "prove out"). The Notice also referred to the same consideration mentioned in the "freeze" Report and Order as to the relatively small contribution which current AM grants appear to be making to the improvement of aural service generally, nearly all of them representing daytime facilities with their inherent limitations, providing first or second local outlets in many cases but often only to very small communities (with most places of substantial size already having them). It was stated that while the provision of "first local outlets" is still of importance, "in our judgment it does not warrant, in itself, acceptance in the near future of applications providing no other substantial service benefit." (Notice, para. 31.) It was also pointed out that large-scale grant of applications for daytime-only facilities tends to preclude use of the channel and adjacent channels for *full-time* operations, which would bring service generally much more needed. With respect to increases in nighttime facilities—which have not up to now been subject to a "25% unserved area" test—it was stated that while these are sought on the ground that they are needed to cover expanding urban areas at night, often this is an excuse to propose facilities serving areas well removed from the station's city. (Notice, para. 19.)

6. The Notice also discussed certain subjects which the Commission hopes to explore in the course of its evaluation of the total AM picture. These included: (1) the possibility of requiring, in AM, a "preclusion showing", somewhat similar to that required with many petitions for additional FM assignments, showing what uses of the channel and adjacent channels would be precluded by the proposal, and what other assignment possibilities exist to meet such future needs and uses; and (2) the possible formulation of rules designed to cut down the tremendously burdensome and expensive work involved in the processing of AM applications, for example a rule to the effect that when one application providing certain service benefits has been accepted (e.g., one which would serve unserved area or provide a first

local outlet), no other conflicting application would be accepted unless it would provide at least as great benefits. The Notice also invited comments on some alternative approaches in various respects (Notice, para. 33(a) to (e)): attaching more importance to providing a second service as well as a first; possibly requiring service to only a smaller percentage of "unserved area"; provision of first or second local outlets as well as a first or second primary service; ways of avoiding intentionally inefficient proposals designed to meet the "25%" test simply by serving an unduly limited area; and possible exclusion of "distant" signals in determining whether an area is presently served, on the theory that service from a distant source, while it may be technically good, is not equal to a closer service in being meaningful to listeners.

II. A BRIEF HISTORY OF AM ALLOCATION RULES

7. Historically, and at present, except to the extent the "freeze" prevails, AM applications have been accepted and considered on a "demand" basis: an applicant chooses and proposes a particular community, frequency, power and directional or nondirectional mode of operation, and his application is evaluated on this basis. Assuming he is qualified in non-technical respects, and his application does not involve objectionable interference to other stations or receive objectionable interference to an extent prohibited by the rules, it is granted. In general, no consideration is given to other possible uses of the channel (or of adjacent channels) in the area, or to other possible frequencies, powers or directional modes which the applicant could employ and which might represent a more efficient allocation. This contrasts sharply with the approach used in assigning "commercial" FM and all television stations. In these services, channel assignments are listed in Tables of Assignments (Section 73.202 for FM and 73.606 for TV), one or more assignments being listed for these communities throughout the United States. An applicant must apply for one of these assignments, either for a station in the listed community or for an unlisted community within a short distance.[5] These assignments have been made, and must be used, on the basis of minimum mileage separations between stations on the same and adjacent channels (e.g., in "Zone I", the Northeast, 170 miles co-channel for VHF TV and 155 miles for UHF TV, 150 miles for Class B FM stations and 65 miles for Class A FM stations). These separations are based on the assumption that all stations operate with maximum facilities and, on that assumption and given interference ratios, are designed to afford stations a reasonably large interference-free coverage area. Directional antennas are not used in TV and FM as an assignment tool, although they are used by a number of stations to increase signal strength in certain directions and avoid wasting coverage in others (e.g., over water). The preengineered Tables of Assignments are de-

[5] In FM, a Class A channel may be used at an unlisted community within 10 miles of the listed community and a Class B/C channel at a community within 15 miles; the distance in television is 15 miles (Sections 73.203(b) and 73.607(b)).

signed both to provide for an adequate number of channels in each community and area, and a high degree of efficiency of channel usage.

8. This planned approach has two great advantages over the "demand" system: it permits the reservation of channels to meet anticipated future needs and developments rather than allowing immediate demand to determine the disposition of spectrum space; and, by assuming maximum facilities, it permits stations to increase their facilities in an orderly fashion even where they start modestly. In AM, by contrast, stations are often "squeezed in", the assignment being made possible only by a combination of minimum power and, sometimes, a rather elaborate directional antenna intended to minimize interference to other stations; this presents problems when the station later wishes to increase its facilities. On the other hand, the AM approach obviously has a great deal more flexibility, and probably permits assignments in more places than are possible under the other system.

9. *Changes adopted in 1964 for AM assignments.* Prior to 1964, AM assignments were made on the basis of "normally protected" contours; an applicant's proposal would be accepted and considered even if it involved some "objectionable interference", as defined in the Rules, to existing stations, and if that was the case, a hearing was normally required in which the service gains and the interference detriment could be weighed (Section 73.24(b) which still applies to applications which were filed before the adoption of the new rules). The rules (Section 73.28(d), adopted in 1954 to replace and modify the earlier engineering standards)[6], also provided a test to insure that an operation would either be a reasonably efficient one or one providing a significant service benefit: the so-called "10-percent rule", to the effect that a proposal must either provide interference-free service to at least 90% of the population within its normally protected contour, or, for nighttime operation, that the station must either be a first local nighttime AM outlet or provide a first primary service to 25% of the area within its interference-free contour.

10. Following a "freeze" adopted in May 1962, the Commission in 1963 proposed tighter rules to govern the consideration of new and increased AM facilities (Docket 15084). These were adopted pretty much as proposed, in July 1964. The chief changes involved were three: (1) the previous concept of a "normally protected contour", which could be invaded by a proposed new or increased operation if the gain would outweigh the loss, was replaced by a strict "go-no-go" principle, embodied in Section 73.37, making the application unacceptable if it would cause interference to other stations within their protected contours; (2) the test as to "interference received" was also made "go-no-go" and tightened somewhat as compared to the "10 percent rule" mentioned; a proposed station must not receive any interference within their protected contours, unless it was either a first local outlet (in a community outside an urbanized area, or of 25,000 or more population within an urbanized area), or would provide a first primary service to 25% of the area within the interference-free contour, in which case interference might be received up to the 1 mv/m

[6] This rule, also, still applies to applications on file before adoption of the 1964 rules.

contour; and (3) the 25% "unserved area" test was made an absolute condition to the acceptance of any application for new nighttime facilities (a new fulltime station or a daytimer seeking fulltime operation), though not for increases in such facilities.[7]

11. Probably the chief purpose of the 1964 rules was to prevent the deterioration of existing service through a series of grants of applications involving some interference to existing stations, each in itself small but cumulatively significant. As noted in the 1968 "freeze" Report and Order mentioned above, in this respect the new rules have been successful, although in other respects perhaps less so. The imposition of a "25% unserved area" requirement as an absolute criterion for new nighttime facilities was a recognition of the fact that any new nighttime operation is a source of interference to other co-channel stations over long distances, even though under the "R.S.S." method of computation, applying the "50% exclusion" rule, it may not be counted as objectionable interference.[8] Therefore, it was believed, rather than tighten the interference-computation rules to a point where virtually no additional facilities could be sought, it would be better to leave the computation rules as they are, and, instead, provide that, to justify the small incremental interference, a really substantial benefit be provided by the new proposal.

12. *The "clear channel freezes"*. Another aspect of recent AM history, referred to by a number of commenting parties, is the "freeze" on the 25 I–A and some other channels, which has existed in one form or another since 1946. Section 73.25(a) presently in effect imposes a "freeze" to these channels, which have the 25 dominant I–A stations, plus 12 authorized fulltime stations in the conterminous 48 states (10 II–A stations plus one at San Diego and one at Albuquerque), and 57 daytime-only or limited-time secondary stations, all authorized before 1946 (there are also some secondary stations in Alaska, Hawaii and Puerto Rico on these channels). Also partially "frozen", in order to protect future allocation possibilities on the I–A channels, are 26 other channels adjacent to I–A frequencies.[9]

13. The "II–A" assignments mentioned in the last paragraph represent the one departure, in the AM field, from the "demand" principle. They date from the Clear Channel decision of 1961 (in Docket 6741), in which the Commission "broke down" 13 of the I–A channels, to a limited extent, providing for one additional fulltime assignment on each. Two of these were existing stations in San Diego, Cal. and Anchorage, Alaska; 11 others were for new class II–A assignments specified in Section 73.21 of the Rules, to be used in a specified state or group of states (one in the Plains states and 10 in the West). All but one of these, the 890 kHz assignment in Utah, have now been authorized.

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[7] In 1968 this 25% test was modified to permit acceptance where a first primary service would be provided to 25% of the area *or population* to be served.

[8] See Section 73.182(o).

[9] These frequencies are specified in Section 1.569, adopted in 1962 following the clear channel decision. That section lists 33 frequencies, within 3 channels of a I–A channel. However, 7 of these have in effect been unfrozen now that all of the II–A assignments except that on 890 kH/s have been authorized. The extent to which the other 26 channels are "frozen" varies with the channel: on some the restraint is very small, but on some it is quite large (e.g. 630 kc/s, to protect the "higher power" potential of both the 640 and 650 kHz I–A stations).

14. It should also be noted that liberal assignment principles for Alaska were adopted at the time of the Notice herein; these have apparently worked well and no comments on the subject were filed in this proceeding. At the same time as the Notice, the "freeze" was also lifted to permit the filing of power increase applications by the few Class IV stations not now having maximum power; this is discussed below.

III. COMMENTS FILED IN THIS PROCEEDING

15. Some 94 parties filed formal comments herein (counting individually about a dozen parties joining in certain comments). There were also some informal letters received. (Commenting parties are listed in Appendix B hereto). Of the parties filing formally, nearly all opposed the Notice proposal partly or entirely; the closest to total support came from Clear Channel Broadcasting Service (CCBS), a group of 12 Class I–A licensees, as discussed below. There was particular opposition from licensees, engineers, and others, to the restrictions proposed on modifications of existing facilities (or "improvements").[10] Some parties, such as Association on Broadcasting Standards, Inc. (ABS, a full time station group) took the position that the tight restrictions proposed for *new stations* are justified, but not those on increases in facilities. More than half of the comments dealt entirely, or largely, with the proposed restrictions on improvements in facilities. To a large extent, some of these parties' objections have been met by a subsequent (1970) Commission pronouncement clarifying the type of modification applications which are considered "major" and "minor" changes (i.e., applications proposing only changes in transmitter location, or directional or non-directional mode of operation, are normally considered "minor"); but their argument still must be considered in connection with other types of modification which are definitely "major": increases in power, changes in frequency, and applications by daytime-only stations for nighttime facilities.[11] We do not attempt herein to discuss all of the comments individually; the following discussion will indicate the main lines of argument.

16. *Views of industry groups.* Six industry groups filed comments, including CCBS and ABS (mentioned above), National Association of Broadcasters (NAB), National Association of FM Broadcasters (NAFMB), Community Broadcasters Association (a group of Class IV stations), and the Association of Federal Communications Consulting Engineers (AFCCE). As indicated above, *CCBS* was the closest of all parties to supporting the Notice proposal entirely. It favored the proposed restrictions particularly as to new stations, as avoiding further over-crowding of the AM band and encouraging

[10] The term "improvement" in facilities is used herein, as it was by some of the commenting parties, to include all of the types of modification mentioned in the text, both "major" and "minor": changes in transmitter site, directional or non-directional mode of operation, power increases, changes in frequency, and new nighttime facilities for daytime stations. Another type of "change" mentioned by a few parties—change in station location (community of license)—falls into a different category, being in a sense an application for a new facilities.

[11] See Policy Statement Concerning Standard Broadcast Applications for Major and Minor Changes, FCC 70–260, F.C.C. 2d, 18 R.R. 2d 1763 (April 14, 1970).

FM, which, now that FM set circulation is large, should definitely be included in any "unserved area" determination and should be relied on to fill the need for additional stations. It is also urged that the Commission take steps to "clear" as many as 40 AM channels for higher-power Class I operations, or national and regional stations, by reallocating stations engaged primarily in local broadcasting to the FM band.[12] CCBS also asserts that the "25%" standard should be tightened to require that 25% of the *area and population* be "unserved", citing in this connection the case of some of the II–A stations authorized, which serve large areas but small populations having no other nighttime primary service. CCBS also opposed any idea that, in making "unserved area" determination, distant signals should be ignored; it asserted that any mileage test of this sort would be arbitrary and its Class I members feel obligated to, and do, render truly meaningful service to rural areas many miles away from their locations. CCBS also renews its oft-made plea for "higher power" for the I–A stations, at least on an experimental basis, urging that skywave service is really the only way to provide good AM service to the present "unserved areas" in substantial amount, and that the present 50 kw level is not sufficient to do so, in view of increasing man-made noise, interference from Latin American stations, and the poor selectivity of present transistor radios.

17. *ABS* agreed with the Notice's view as to the desirability of restricting new facilities to those substantially serving "unserved area", saying that in this respect an "unrestricted demand" system is not justifiable, since it inevitably leads to a concentration of stations in and around large cities where there is a high level of economic support (often in "suburban" communities because of the more or less automatic "307(b)" preference which such stations receive despite the many outside signals available, and even though such proposals often present problems as to whether they are really not for large-city stations in fact if not in name). Thus, any AM stations to be permitted from now on should provide service where it is needed. Thus, it supported generally, for new stations, the "25%" standard. On the other hand, ABS vigorously opposed the restriction proposed on *improvements in facilities*, asserting that this would prevent stations making changes necessary to adequately serve their rapidly growing metropolitan areas, and thus *improve the quality* of existing service (this point is discussed separately below). It is asserted that if such restrictions are adopted, AM broadcasting will sink into obsolescence.[13] ABS also raised certain specific points: (1) where existing FM service is to be considered in relation to "unserved area", probably it should be on the basis of such service to *100%* of the area instead of 75%; otherwise, some "unserved

[12] CCBS cites, in this connection, the views expressed in the 1964 Report on Radio Spectrum Utilization issued by the Joint Technical Advisory Committee (JTAC), to the effect that in view of the crowded condition of the AM band in the U.S. and elsewhere, it would be in the long-range public interest to move *local* broadcasting (as opposed to national and regional) to the FM band, which is better suited for it because it offers superior technical characteristics, more consistent coverage, and better interference protection.

[13] This type of argument was urged also by several other parties, to the effect that with both other communications media and AM in other nations developing rapidly, it is not appropriate to restrict improvements in U.S. AM service.

area" would still remain; (2) educational FM stations should be included in this determination, since they do render service; (3) including in the FM availability test "unassigned but assignable" channels may present serious administrative problems; (4) there should *not* be an exception for proposals competing with renewals, since (with other new facilities not available) this would simply encourage such activity and this is particularly bad since the new applicant could propose greater facilities whereas the existing station could not;[14] (5) any consideration of "across the board" power increases, urged by some other parties, is much too complex for consideration at this time (involving both international and domestic problems); and (6) any consideration of permitting assignments which would provide a *second* primary service, or a first or second *local* service, should be only on a waiver basis, or otherwise the whole purpose of the rule would be thwarted (it is pointed out that many, probably most, recent and pending new applications are for a first or second station in their communities. It was urged that no such blanket restrictions are justifiable and that increases should simply be subject to the usual "no interference" tests.

18. NAB's comments related entirely to the proposed restriction on facility improvements, which, it points out, in some parts of the country would completely "freeze" AM stations at their present levels (e.g., North Carolina, where all but a very small part of the state receives 1 mV/m or better FM service from existing FM stations). NAFMB,[15] as might be expected, supported the proposed inclusion of FM in the determination of what is "unserved area" and the concept that a new applicant should look first to FM, and in general treating that service as an integral part of a total aural service. It was asserted that both AM and FM are needed if the nation is to receive adequate radio service—AM for its extensive groundwave and skywave coverage potential—and that too many substandard AM operations have been authorized (because FM has lagged) and this has hurt the development of FM. In sum, NAFMB supported the proposal as to new stations, and urged us to proceed with the type of reallocation recommended by JTAC (footnote 12, above). On the other hand, in its reply comments it expressed opposition to the proposed restrictions on improvements in existing stations, urging that effective AM service is needed, to rapidly burgeoning urban areas. This, it was said, should be looked at on a case-by-case basis.

19. The *AFCCE* comments opposed the idea of an "unserved area" criterion, or, indeed, any restriction beyond the overlap standards (adopted in 1964) to prevent objectionable interference, which, it stated, have worked well. It was stated that channel usage is going to be largely determined by presently existing stations in any event, so that no additional restrictions at this point are warranted. It was asserted that demand should determine what is possible, and the real

[14] A number of existing licensees made one or both of these points in their comments, particularly the second.

[15] The NAFMB is composed of FM broadcasters, some independent and some also licensees of companion AM stations.

needs for radio service do not really relate to "unserved area." [16] It was also urged that FM should not be taken into account, for reasons discussed separately below; and AFCCE made some specific suggestions also mentioned below. The comments of the *Community Broadcasters Association* related entirely to the one-year limitation adopted in 1969 on the filing of applications by Class IV stations for power increases (only a few had not previously applied), urging that such a deadline should not be set.

20. *Other general comments.* A number of other comments generally opposing the proposal—which is claimed to represent a near-total "freeze"—were filed, which advanced among them in various forms the following views and ideas (some of which have been indicated above).[17]

21. *The great need for increased facilities.* It is urged that there is a tremendous general need to increase facilities (as noted, some of the arguments on this score, but not all, have been rendered moot by the 1970 pronouncement concerning major and minor changes). This is said to be true because of: (1) the great and rapid increase in the size of urban areas, which make more power or changed transmitter locations necessary to serve them and which will continue for a long time; (2) the unsuitability or future unavailability of present transmitter sites, because of the building up of surrounding areas (with reradiation problems), freeway construction or urban renewal, requiring relocation and, often, a power increase from the new location to continue to serve the whole urban area adequately; (3) increased man-made noise levels; (4) the need to correct antiquated directional arrays. Many parties also urge the need for nighttime service by daytime-only stations, which is discussed below in connection with three particular comments by such licensees.

22. *Nighttime interference levels have not increased and will not increase if new nighttime facilities are permitted.* One of the key concepts in the restrictions adopted by the Commission in 1964 on new nighttime authorizations was that any new nighttime operation is a source of additional interference to co-channel stations, even though—under the "50% exclusion" concept embodied in Section 73.182(o)—it does not increase the nighttime limit of any station enough to be cognizable under the rules as "objectionable interference." Many parties, particularly engineering, argued with this idea. It was asserted that while some interference is thus added, it is minuscule and insignificant. In this connection reference was made to a study sponsored by the NAB in 1962 (prepared by George Davis), concerning interference levels on certain channels in 1960 as compared to 1940. It was found

[16] AFCCE used as an example Ventura County, California, which has had a tremendous growth in recent years, with new cities of large size, but where the availability of AM facilities is sharply limited by the numerous Los Angeles stations. It was stated that, while these stations provide it with signals and thus it is not "unserved area", it is doubtful that they can do much to meet its particular needs, since the needs of that city itself are great enough.

[17] The comments chiefly dealt with in these paragraphs are those of McKenna and Wilkinson and Robert L. Booth, Esq. communications attorneys, and the following communications engineering firms: Ralph J. Bitzer, Jules Cohen and Associates, Cohen & Dipell, Commercial Radio Equipment Co., Peter J. Gurecklis (John Mullaney & Associates), Vir James, Jansky and Bailey, L. J. du Treil, Robert L. Jones, George Lohnes (Lohnes & Culver), E. Harold Munn, Silliman, Moffatt & Kowalski, Carl Smith, A. Earl Cullum & Associates, and J. G. Rountree.

in the study that, despite a tremendously increased number of stations and virtual elimination of "unserved" and "gray" daytime area in the Southeast, the nighttime limits of many stations on these channels had increased little or none, and in some cases had been reduced as stations directionalized their nighttime operations.[18] Attention was also called to the *KWK* (St. Louis) situation, where, when that license was not renewed and multiple new applicants competed for the frequency, the result was a substantial improvement in the service areas of 9 co-channel stations. Some of the parties urging this point claimed that the impression of increased nighttime interference is basically a subjective, psychological one resulting from two factors: (1) with the movement to the suburbs, a listener may well now live outside of his local station's interference-free nighttime contour, and thus experience interference, whereas if he had remained in his earlier in-city location he would find no more now than formerly; and (2) tuning across the band at night today, the listener may encounter many fairly new stations, with high interference limits, in places on the dial where 30 years ago there was only silence; but the stations which were there then can still be received just as well.

23. On this basis, a number of parties urged not only that no restrictions be imposed here on nighttime authorizations, but that the "25% unserved area" criterion adopted in 1964 for new nighttime operations be abandoned. It was claimed that this, not any reluctance of parties to establish new nighttime facilities, is the reason why very few such proposals have been advanced in recent years; correspondingly, if the restriction were removed, needed expansion of nighttime service would result. It was also asserted that this restriction is undesirable in presenting a choice of nighttime local services and attainment of competitive equality.

24. *Emphasizing "unserved area" at the expense of other needs.* Many parties urged that the emphasis on "unserved area" embodied in the Notice is both useless and wrong, pursuing an impossible objective at the expense of other needs for increased service. It was urged that: (1) there simply is not and will not be economic support in these areas for stations in any number sufficient to make a substantial dent in the "unserved area" (day or night); (2) the granting of new or increased facilities in other parts of the country, at least daytime, will not generally have any significant preclusionary effect on later facilities serving "unserved area" if and when there is any demand for them (or, at least, that this could be handled on a case-by-case basis by way of a "preclusion study"); (3) the most likely way to serve some of this "unserved area" is permitting increased facilities for existing stations, which would also tremendously improve their coverage of their own urban areas; (4) this emphasis, which includes "service" from distant sources, ignores the tremendous need for and importance of *local service*, a key objective of the Commission for many years under Section 307(b) of the Communications Act; (5) it also ignores the im-

[18] In the same inquiry, NBC made a study of the 1941 and 1962 limits of three Washington, D.C. stations, including its own WRC, computed by the 50 percent RSS exclusion method. It showed two as declining (2.8 to 2.6 mV/m and 2.6 to 2.3 mV/m) and WRC increasing, 3.5 to 3.6 mV/m. NBC also carried the analysis of WRC's limits out on the basis of 10% exclusion and found limits of 4.3 mV/m in 1941 and 4.7 mV/m in 1962.

portance of a *choice of service*—at least two, and likely more—and thus tends to preserve monopoly and diminish competition, for example, in a number of cities of over 25,000 population (outside of urban areas) having only one station; (6) there are other pressing needs much more likely of fulfillment, including that for adequate coverage of burgeoning urban areas and shifting populations, for local outlets in "new towns" such as Columbia, Maryland (projected to have a population of over 100,000 by 1980), outlets for minority groups, and greater service generally to fulfill the specialized, localized role of modern radio.[19]

25. *The significance of FM.* While NAFMB and a few other parties supported the Notice's treatment of FM, many parties vigorously opposed it. Their arguments included the following: (1) it is essentially immoral to create an "artificial shortage" in AM just to stimulate FM; rather, the people of the area involved, and applicants proposing to serve them, should have a choice as to which they wish to use; (2) FM does not need any stimulation, shown by the great increase in stations between 1962 and 1969 (nearly 60%) and the occupancy of all or nearly all channels in much of the country including areas around large cities; (3) FM is still not the equivalent of AM in ability to serve the public, in view of limited set circulation and particularly the absence of FM sets in automobiles during highly important "drive time"; (4) terrain problems in rough or mountainous areas which seriously limit FM service range in some cases; (5) the very limited extent to which FM channels are in fact available, in much of the country, for a potential applicant to use; (6) the utter impossibility of establishing a viable FM station in some parts of the country where it has not developed at all outside of large centers (e.g., Wyoming, with the only stations those in Casper and Cheyenne, and northern Maine); (7) FM is *not* cheaper than AM as the Notice claimed, but in fact AM is less expensive even if it involves a simple directional array (parties gave various figures in this connection). It was urged that—with only 25% of assigned channels vacant as of the end of 1969, and only 13% east of the Mississippi—telling potential applicants to "look to FM" is largely illusory, and, also, that any concept of using "unassigned but assignable" channels in this connection is an administrative impossibility and grossly unfair to applicants, in view of the delays and problems involved in FM rule making; (8) FM and AM are and should be treated as *complementary*, each being used where it best serves.

26. *Whether there is an "AM shortage".* Many parties argued with the concept that there is in fact any shortage of AM spectrum space, as the Notice indicated. It was claimed that, in much of the country away from urban centers, this is not true even under present assignment policies, and it is certainly not true in view of the potential for further assignments if and when the various clear channel "freezes" are lifted. For example, it is said, the 25 Class I–A channels represent nearly 25% of AM spectrum space, which could be made available

[19] It was pointed out that rather recently (1968) the Commission found the city of Elizabeth, N.J. to be sufficiently needful of local service, despite the plethora of New York City signals, to warrant a local outlet as compared to a more distant community.

for daytime, if not full time, stations; and the same is true of adjacent channels which are likewise partially "frozen" under Section 1.569, and to some extent other channels (I–B frequencies) which were unfrozen earlier only to have the general 1962 "freeze" quickly superimposed on them. In any event, it was urged, this reservoir makes it inappropriate to impose a freeze such as that involved in the Notice proposal. Rather, it was said, AM is really as available as FM, if not more so, and therefore a concept of looking to FM in order to avoid depletion of AM is basically fallacious.

27. *The Commission's role and obligation.* A number of parties claimed that the Notice proposal, and sharp restrictions involved, really reflected the Commission's effort to further "administrative convenience" by simply choking off applications. It was asserted that, while there are problems in AM processing and determination, they certainly do not warrant this approach, but, rather, efforts to deal with them as such. Some suggestions made are set forth below. It was also claimed (e.g., in the McKenna and Wilkinson comments) that these are largely of the Commission's own making, in the context of some Court decisions such as *Ashbacker* and *KOA*, which have imposed substantial requirements.[20] For example, it was argued that the Commission for a long time made substandard, interference-causing AM grants as a matter of policy, and existing stations, realizing this, asserted their KOA hearing rights in every case even where the interference was minuscule, lest the grant become a precedent and also because the Commission's consideration did not take into account the cumulative effect of such impingements on a given existing station. Also, some parties urged that the assertedly erratic treatment of AM over the years—"freezes", thaws, and then "re-freezes"—created uncertainty and a pent-up demand, which resulted in the filing of numerous applications involving "chain reaction" conflicts, particularly when certain frequencies were unfrozen. In general, it was urged that the Commission cannot properly use these considerations as ground to support the near-total "freeze" contemplated by the Notice, but must do the best it can to improve its procedures and seek the necessary additional staff to handle applications which reflect a genuine demand and therefore, in general, applications which reflect a genuine demand and therefore, in general, a need. In this connection, two other points were also urged: (1) while the Notice spoke generally of the proposal as an interim measure pending further in-depth study, there was nothing specific as to what would be studied or when, so that it must be assumed the near-total freeze would last indefinitely; (2) some parties accused the Commission of having in mind, without saying so, a form of "birth control", an idea that a given community or area simply does not need, or cannot well support, any more stations than it now has.

28. "*Foreign preemption*". A number of parties, particularly engineers, urged that any restrictions on U.S. AM assignments—beyond

[20] *Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327 (1945); *FCC* v. *National Broadcasting Company* (KOA), 319 U.S. 239 (1943). The former established the right of copending mutually exclusive applicants to a full hearing against each other; the latter established the right of a station, which would receive objectionable interference, to a hearing on that issue.

those necessary to avoid interference—are undesirable because foreign nations on the continent are not bound by such restrictions and will make use of the frequencies in places near the border, to the exclusion of any later U.S. use. It was also claimed that when the foreign use is nighttime, as it often will be, this means additional interference to U.S. stations even though it is not cognizable under the international R.S.S. rules just as it would not be domestically. This argument was one urged for repeal of the "25% unserved area" criterion for new nighttime assignments adopted in 1964.

29. *Use of preclusion studies.* One of the matters mentioned in the Notice—not as part of the present proposal but for possible ultimate use—was a requirement of a "preclusion study", from which it could be determined what the impact from a given application proposal would be on other possible uses of the channel and adjacent channels in the general area, and what other assignment possibilities remain to meet the needs in the "preclusion area". Such a study is now required in connection with many petitions for FM rule making.

30. Some parties, e.g., Silliman, Moffat and Kowalski, supported this as a useful and feasible concept; as mentioned above, some parties suggested it as a method of "case by case" evaluation, for example showing whether or not a proposed use would preclude an assignment which would serve "unserved area". On the other hand, at least one party (Booth) opposed it as unworkable, in view of the tremendous differences which exist in AM propagation (ground conductivity and frequency) and the many variables involved in possible directional operation.

31. *The "demand" system.* Many commenting parties praised the traditional "demand" system of AM assignments, as the basis of the country's unparalleled AM system (with its tremendous number of stations and local outlets), and urged that it be continued, although perhaps with some modifications to encourage service to "unserved areas". On the other hand, others (e.g., McKenna and Wilkinson) urged that this system be considerably modified or abandoned, for example with a Table of Assignments containing initially existing stations, with additions thereto as a result of rule making, just as in the FM and TV service.

32. *The concept of "waste".* It was said by some parties that the whole idea that AM spectrum is "wasted" by grants on a "demand" basis is basically wrong, for one reason because spectrum, while very much a valuable and scarce national asset, is not a "wasting" one in the sense that minerals or petroleum are. It was asserted that later shifts in station location or facilities—either voluntarily or through Commission "show cause" proceedings—are always possible. Therefore, it was said, the "waste" involved is in *not permitting use of the frequencies now.*

33. *Comments urging the importance of nighttime AM service.* A number of parties, many of them licensees of daytime-only stations, urged the importance of their being able to obtain nighttime facilities to better serve their communities and surrounding areas.[21] Three com-

[21] At least one station whose licensee made this argument, WPVL, Painesville, Ohio, has since applied for and received grant of nighttime facilities.

ments illustrate some aspects of these suggestions and possible approaches. *Sea Broadcasting Corporation* is the licensee of Station WVAB, the only station licensed to Virginia Beach, Virginia, a city which is one of the four large cities making up the Norfolk-Portsmouth Standard Metropolitan Statistical Area (SMSA), and had a 1970 Census population of 172,106. WVAB is daytime-only, and the licensee urged that there is a great need for a local nighttime facility to meet the substantial particular needs of Virginia Beach, including matters such as elections, weather and school closings, local emergencies, discussion of public issues, and provision of time for local advertisers and political candidates. It was asserted that the only full-time station generally received throughout this city, WTAR, Norfolk, simply does not meet these needs because it has 16 major communities to serve and, for example, mentioned Virginia Beach material only four times in a week of evening news programs (three of them on one evening about the same item). It was claimed that, while Virginia Beach is part of an SMSA with a larger city, the Commission should adhere to the policy applied in *Monroeville Broadcasting Company*, 12 FCC 2d 359 (1968), where it recognized the need of Monroeville, Pennsylvania, for an outlet despite a plethora of primary service from nearby Pittsburgh stations, finding that none of the latter showed "an above average sensitivity to the needs" of the city of Monroeville. FM was claimed not to be the answer, at least as to *present* needs, in view of the still much greater circulation and universality of AM. The suggestion was that the Commission adopt a rule to the effect that when a "major political unit" of over 50,000 lacks a local AM nighttime service, the "25% unserved area" and other technical rules should not apply if it is shown that the proposed facility would not cause interference to other stations (under the traditional nighttime standards) and that the proposed station would serve nighttime a substantial part of the population within the political unit.[22]

34. Another aspect of such situations is presented in the comments filed by Gordon A. Rogers, President of Radio KGAR, the licensee of daytime-only Station KGAR at Vancouver, Washington. Vancouver, a city of about 43,000 in southwestern Washington, in the Portland, Oregon SMSA, has two other AM stations assigned, one full time (KISN), but, as Mr. Rogers pointed out, this station is actually located in Oregon (both studio and transmitter location) and has been the subject of Commission action because of improper identification as a Portland station (continuation of its operation is now the subject of a hearing proceeding, although not chiefly for this reason). Mr. Rogers claimed that this station really is designed to serve Portland and Oregon, and, in fact, does not serve Vancouver at all as a local outlet; and, that city and its county therefore do not have local nighttime service (no FM channel is assigned to Vancouver, nor, in view of its proximity to Portland, is such an assignment likely). Mr. Rogers vigorously opposed the Notice proposal, as stifling AM development, instead urging that daytimers should be permitted to "go nighttime" if they can

[22] The latter part of the proposal apparently represents the fact that a nighttime facility would not include all of Virginia Beach—which has a very large area—within its interference-free contour. Sea proposed that the Commission make this "substantial" determination on a case-by-case basis.

meet the traditional non-interference tests. It was pointed out that with Station KOIN-FM, Portland, having a very large 1 mV/m coverage area, if FM service is taken into account as a bar to AM improvement, this would preclude AM facilities in an extremely large area in Oregon and Washington. If this is going to be the case, it was urged that KOIN should be required to give its AM facility to KGAR and take the present KGAR frequency, which has less coverage potential but would still leave KOIN with its wide-coverage FM and television facilities. It was urged that no "unserved area" test is appropriate in such cases.

35. The comments of *Tri-State Broadcasting Company*, licensee of of daytime Station WGTA, Summerville, Georgia, present another type of situation. Summerville is the county seat of Chattooga County, with populations of about 5,000 and 20,000 respectively, and WGTA is the only station in the county. No FM channel is assigned in the city or county, nor, in all probability, could an assignment be made. The only nighttime AM service in the area is from Class I Station WSB, Atlanta, which puts a 0.5 mV/m signal, but not a 2 mV/v signal into Summerville and thus provides primary service to the surrounding area but not to the city itself. Two Chattanooga FM stations provide predicted 1 mV/m signals to the city and area; but it is claimed that these do not in fact provide adequate service because of rough terrain (they are respectively 32 and 44 miles distant). There is no local daily newspaper. Tri-State urged the great need of this area for local nighttime service (particularly in view of the large "three shift" work force which travels to and from work during nighttime hours), and, also, and in particular, the economic impossibility of building a directional array which would enable it to meet interference protection requirements at night with the normally permissible power level of 500 watts (regional channels). It was asserted that this (including the acquisition of a large enough site) would cost over $115,000, which is simply not justifiable in a community of this size. Therefore, Tri-State's basic request is for a rule *which would permit it to operate non-directionally with less than the minimum power*, or 100.5 watts, which it could use and not raise the interference limit of co-channel stations. So operating, with a 9.73 mV/m limit to it (a radius of about 4 miles), it would provide a primary service to some 8,221 persons, of whom 4,706 now receive no nighttime AM primary service and 3,472 receive only one, and would thus meet the "25% unserved area" test as modified in 1968 to include a 25% population criterion. It asked for a rule which would permit non-directional operation with sub-minimum power at night if the applicant shows that a directional array necessary to meet protection requirements with the regular minimum power would be either impossibly complex or economically unfeasible. It was urged that this approach would solve the problem of providing local nighttime service in many U.S. communities.

36. *The "minority group" problem: comments of Dr. Wendell Cox.* The comments of Dr. Wendell Cox, D.D.S., a principal in, and general manager of black-owned full-time AM Station WCHB, Inkster, Michigan, and FM Station WCHD, Detroit, related to the possible acquisition of broadcasting facilities by "minority groups"—blacks

in his case—pointing out that while there are some 700 stations presenting at least some programming aimed at the black audience, there are very few black-owned stations (they include the stations mentioned, and assertedly only about seven other AM and fewer other FM stations; but the number has increased somewhat since these comments were filed in November 1969). Dr. Cox urged that rules not be adopted which would restrict the opportunity for ethnic and racial minorities to compete for additional facilities in markets where they constitute large portions of the population. He asserted that—with the disadvantaged position of the black population during the period when facilities in large markets were available, and the present impossibility of adding any new ones in most large cities—steps should be taken to make more frequencies available to such groups, rather than adopting further restrictions of the type contemplated by the Notice. It was asserted that, while "militant" groups have approached this problem by renewal challenges, it should not be necessary to take something away from an existing licensee in order to achieve a minority voice, if there are other ways by which such groups can obtain *new* facilities. A re-shuffle of frequencies in places such as New York, it was claimed, could provide an additional channel which minority groups could seek.[23] Dr. Cox claimed that FM is not a substitute in this respect; Black taxi drivers, filling station workers, etc., are "transistor oriented" and FM sets are less available to poor black homes. Therefore, as shown by his experience with the Detroit FM station, the potential black FM audience at this time is small, even if FM channels were available in large cities, which they usually are not (and existing FM licensees, it was asserted, put prices on their existing FM stations which make purchase out of the question even for a fairly successful black group). Specifically, Dr. Cox opposed the Notice proposal, urged that the Commission take steps (by re-shuffling channels) to provide at least one frequency in major markets where there is now not a black-owned or controlled station, and stated that he is not asking that channels be available *only* for black applicants, but that they be given an opportunity to *compete* for them.

37. *Suggestions advanced by the parties.* Besides general opposition to the restrictive aspects of the Notice proposal, a number of parties advanced affirmative suggestions which they claim will improve aural broadcast service and the assignment process. Some of these—including the general elimination of the "25% unserved area" requirement for new nighttime facilities, possible use of "preclusions studies" as a basic allocation tool, the specific suggestions of the Virginia Beach and Summerville, Georgia, applicants for getting nighttime facilities in their particular situations, and the suggestions of Dr. Cox concerning a voice for minority groups—have been mentioned. Others are discussed in the next few paragraphs. Some of these ideas are clearly beyond the scope of this proceeding; others could conceivably be adopted herein but in our view should be the subject of more explora-

[23] These comments were accompanied by an engineering statement of E. Harold Munn, Jr., to the same effect as part of his separate engineering comments, including data as to channel spacing and the date of authorization of stations in large cities.

tion if they are to be considered at all; and still others, such as those relating to processing and procedures, do not require rule making.

38. "*Across the board*" *power increase.* The engineering firm of Cohen and Dippel—supported by a number of parties, particularly Class IV licensees seeking increased nighttime power—proposed an "across the board" power increase for all classes of stations. The proposal was that: (1) Class I stations could increase from 50 to 250 kw, with I–A stations directionalizing (on the "broken down" I–A channels) to protect II–A stations; and I–B stations similarly protecting co-channel I–B stations where there are any; (2) Class II stations to be permitted 100 kw, with full-time Class II stations on I–B channels to protect the new 1 mV/m 50% contour of co-channel I–B stations (which is farther out than the present 0.5 mV/m 50% contour), and Class II–A stations protecting Class I–A stations on the present 0.5 mV/m 50% basis; (3) regional (Class III) stations to be permitted 25 kw (the Munn Engineering comments suggested consideration of an increase to 50 kw); and (4) Class IV stations to go to 500 watts at night with a 5/8 (0.625) wave length antenna. The latter is designed to reduce high-angle radiation, the chief source of interference to other stations within 300 miles. Studies on Class IV situations in Illinois and Tennessee, said to be typical, showed increases in interference limits of 35% and 12%, respectively, but increases in groundwave field intensity of 116% and 100%, resulting in a considerable net gain in service areas. In connection with the Class I power increase also, it was asserted that this would result in over-all improvement, improving both groundwave and skywave coverage despite increased interference. It was recognized that these changes might involve some adjacent problems in some cases, and also would often require modification of international agreements. ABS, in reply comments, urged that such changes would be very complex and should not be undertaken at the present stage of this proceeding.

39. *Treatment of I–A and adjacent channels.* A number of engineering, and other parties, suggested that the Commission take steps to make additional assignments (daytime if not full-time) on I–A channels, and wholly, or partly, lift the "freeze" on use of adjacent channels presently contained in Section 1.569. On the other hand, CCBS, urging the importance of skywave service from unduplicated I–A stations, asked that steps be taken to "clear" a number of additional channels for wide-coverage operation, by moving to the FM band stations designed primarily for local coverage.

40. *Use of a Table of AM Assignments.* Some parties, such as McKenna and Wilkinson and Ralph Bitzer, supported the idea of a Table of Assignments for AM, which would contain initially only existing stations, with additional assignments requiring amendment of the Table through rule making.

41. *Suggestions concerning procedures and processing.* Other suggestions related to the Commission's procedures and methods used in handling and consideration of applications, in an effort to deal with the problems mentioned in the Notice without the Draconian measure of a near-total "freeze". These included:

(a) *Relying on licensees to check for interference.* The AFCCE specifically, and other parties more generally, suggested that the Commission abandon the system whereby every AM application is carefully checked as to interference to existing stations, and instead, rely on the existing stations themselves for this, with the Commission staff initially only spot-checking and examining applications only where international considerations are involved. The AFCCE's suggestion was that a system (using only clerical personnel and a computer) be worked out for notifying existing stations on a monthly basis of all applications for facilities on their channels or up to 30 kHz removed, with the licensee to have the burden of objecting if interference to it would be involved. The licensee would have 60 days to file objections, with a complete engineering showing, and if objection is filed, the applicant and other parties would have 45 days to reply. The staff and the Commission would then consider the matter. If no objection is received and the application appears otherwise in order, it would automatically be granted.

(b) *Filings only by professional engineers.* The AFCCE and other engineering parties urged that applications be required to be prepared by professional engineers, as a way of insuring engineering showings of good quality, accuracy and completeness. It was said that this requirement—under which persons of "proven ethics and expertise" would be putting their reputations "on the line"—would go far to cut down the staff and Commission problems in dealing with inferior engineering submissions. In this respect, these parties make the same arguments urged by the AFCCE in a pending petition to adopt this requirement for all of the Commission's processes which involve engineering.

(c) *Furnishing an extract of material in the application.* McKenna and Wilkinson, noting that one of the time-consuming aspects of application processing is the preparation of memoranda setting forth the important facts as to an application—not only engineering but finances, ownership, programming, etc.—suggested that applicants be required to file with their applications an extract of key information in these categories, which would shorten the time involved in presenting items for consideration at higher staff level or by the Commission.

(d) *Increased filing fees.* Silliman, Moffat and Kowalski suggested that application filing fees might well be raised, to cover the substantial costs of AM application processing if it is to be continued on its traditional basis (as the parties generally believe it should). In 1970, of course, the Commission raised its fees, for AM and other applications, substantially compared to what they were when these comments were filed, and further increases are currently under consideration.

(e) *Use of computers.* A number of parties suggested that the Commission should make more use of computers in AM processing. The Silliman comments suggested the accumulation of information concerning AM stations in a "computer bank", which would be available to the public and also supported, at least in part, by public users.

42. *Suggested broadening of the proceeding.* Some parties, notably E. Harold Munn, Jr., urged that the scope of the proceeding should be broadened by a Notice of Inquiry and Further Notice of Proposed Rule

Making. Munn suggested that such a document might well look toward the following, in addition to further breakdown of the I–A channels already discussed:

(a) "Show cause" orders to daytime-only licensees as to why they should not be required to install nighttime facilities, in cases where it appears that they feasibly could and particularly where FM channels are not available;

(b) Steps to meet the needs of minority groups for increased ownership of facilities.

(c) Moving I–A stations out of the large cities, where they are now located, to smaller places where they could do a much better job of serving "unserved area", replacing them in the large centers by Class II or III stations.

(d) "Show Cause" orders to full-time stations which cause high nighttime limits to stations in "unserved area" portions of the country, as to why they should not be required to improve their arrays so as to reduce interference to these stations.

(e) Setting a time limit for resolution of the Clear Channel proceeding.

43. *Other suggestions.* Other suggestions made included the formation of a Joint Government-Industry Committee to undertake a sweeping evaluation and reform of the aural broadcasting assignment structure; that the Commission urge adoption of "all channel" AM–FM receiver legislation as really the only effective way of bringing these two aural services to parity; and various fundamental changes in AM and FM technical rules (suggested in the Booth Comments).[24]

IV. THE DISTRIBUTION OF AM AND FM SERVICE AND FACILITIES IN THE CONTERMINOUS 48 STATES

44. For reasons discussed below, rather than the "rules pending further study" contemplated by the Notice herein, we have decided to adopt, instead, rules which are expected, with minor modifications, to govern the assignment of new and increased AM facilities for some time to come. Therefore, it is appropriate to examine the picture of aural broadcast service as it is today in the United States, both with respect to *reception* or the *availability* of a usable signal from a nearby or distant source, and as to *transmission*, the existence or absence of a *local* station, or full-time service or a choice of local service, in communities, or nearby communities. It is of course well settled that under Section 307(b) of the Communications Act, the Commission's mandate to provide for a "fair, efficient and equitable distribution of radio

[24] These included, in FM, reducing both the bandwidth (to 100 kHz) and the adjacent-channel requirements, and, in AM, deleting the allegedly obsolete "blanketing" and second and third adjacent channel separation requirements, and liberalizing the rules concerning principal-city coverage; and exploration of "single sideband" AM operation.

We have not mentioned specifically herein the longest comments of all, those filed by Coastal Broadcasting Company, Inc., licensee of WBEA and WBEA–FM, Ellsworth, Maine. These largely were related to that party's pending petition for breakdown of the Class I–A channel 820 kHz to provide a new Class II–A assignment in Maine. They made the same point urged by others herein as to the inadequacy of FM as a substitute for additional FM development in places such as northern Maine, and of the alleged difficulty in getting coverage via FM comparable to that which a II–A station could provide.

service" includes both of these concepts, as do the various statements of Commission allocation principles such as the Sixth Report and Order (1952) in television, and the Notice of Proposed Rule Making in Docket 15084 (1963), the proceeding which led to the 1964 AM rules. The discussion below relates to the 48 conterminous States; we discuss later herein the situation in Alaska, Hawaii, Puerto Rico and the Virgin Islands, which present different considerations because of their distance from the rest of the nation.

A. AM and FM reception and service

45. *Daytime AM service.* With more than 4,200 stations in the 48 States, all operating daytime, daytime AM service in the nation is extremely widespread, and—except in the West and certain limited areas elsewhere—all but *very* small areas have at least one daytime primary service.[25] Daytime "gray" areas, which receive only one primary service, appear to be somewhat larger (especially in view of the extent, discussed below, to which many counties in the U.S. have only one station); but even here there is relatively little absence of a choice of service. As indicated in paragraph 22, above, the 1962 NAB-George Davis study showed that in the Southeast, by 1960, only 0.6% of that region's area had no primary service, and only 1.4% of the area was limited to one primary service.

46. *Nighttime primary service.* "Unserved areas", those without primary service, are substantially larger at night because of the high interference levels which prevail (limiting the service areas of those stations which operate at night). The tool usually used in evaluating this situation is a map originally prepared by CCBS in the 1940's for the Clear Channel proceeding and updated in January 1962 to reflect 1961 conditions (it is generally agreed that in over-all terms, nighttime "unserved area" has not been significantly changed since). This shows some 1,726,000 square miles, or over half of the land area of the conterminous 48 states, as without nighttime "Type B" groundwave service.[26] This area in 1961 contained some 25,106,000 people.[27] The amount of "gray" area, receiving only one primary service at night, is also substantial. The unserved area includes a considerable portion of the three Pacific Coast states, the bulk of the Mountain and western portion of the Plains states, and the bulk of the South and Southeast, Virginia and West Virginia, and northern New England as well as substantial portions of Michigan and Pennsylvania and parts of most other states. An important factor in the provision of service, in over-

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[25] There are extensive "unserved areas" in the Plains and Mountain States (and the interior portions of some of the Pacific States), and smaller areas farther east, including northern New England, northern New York, upper Michigan and northern Minnesota, and possibly north central Pennsylvania. In the East and Southeast there are small interstitial unserved areas, particularly where ground conductivity is low.

[26] The "Type B" groundwave nighttime service shown on the CCBS map is roughly equivalent to primary service, representing more sophisticated concepts evolved during the clear channel proceeding, whose validity the Commission recognized but whose complexity was held to make it unsuitable for ordinary application processing.

[27] The "unserved area" actually increased slightly from 1957 to 1961, but the population declined slightly. In the portion of the pre-sunrise proceedings concerning the I–A channels (Dockets 17562 et al.), some of the Class II opponents of the I–A stations urged that the decline in population, despite an increase in area and the great population growth of the United States generally, meant that this largely rural "unserved area" was losing population so that providing it with nighttime service is a matter of smaller importance. See the Report and Order in Dockets 17562 et al., 18 FCC 2d 705, 715 (1969).

all area terms, is the wide primary services areas of the Class I clear channel stations, such as those at New York, Chicago, St. Louis, Cincinnati, Des Moines, Minneapolis, New Orleans, Forth Worth, and elsewhere.[28] One factor reinforcing this pattern, as elaborated below, is that the bulk of Class II and III full-time stations are also located in or near the large cities of the country (Class IV stations also operate full time and are much more widely distributed geographically, but they have very small nighttime coverage areas principally because of the very high interference levels which result from the great many co-channel stations).

47. *Skywave (secondary) service from Class I stations.* In order to offset these limitations on nighttime primary service, reliance is placed on the skywave, or secondary, service rendered at night by Class I stations (25 I–A and 33 I–B) assigned to operate with high power and afforded a high degree of protection so that they can provide this service. Skywave service is recognized as somewhat intermittent and subject to "fading"; but it is a useful way of providing at least a modicum of service to the large "unserved areas". This service is regarded as generally useful out to about the station's 0.5 mV/m 50% skywave contour, which for a nondirectional operation is 700 to 750 miles from its transmitter. All parts of the U.S. receive skywave service from these Class I stations, usually from several.

48. *FM service.* FM service, from more than 2,200 stations, is likewise widespread in most of the nation, generally excepting the areas mentioned above for daytime AM service. The FM coverage map published periodically by the NAB shows the U.S. as completely covered, except for very small areas, about as far west as the 98th meridian in the Plains states, and then largely a coverage void until the Pacific states are reached. However, this is based on coverage out to a station's 50 uV/m contour, which does not always represent reliable service and is not the basis of interference protection.[29] As mentioned in para. 18, above, the NAB introduced a map herein showing almost complete coverage of the State of North Carolina by 1 mV/m signals from existing North Carolina facilities. However, since North Carolina is and has long been a state of widespread FM development, this is not necessarily typical of all of the nation. The engineering comments prepared by Peter V. Gureckis contained a similar map of all of the U.S. east of the Mississippi (1 mV/m coverage of all existing stations and assuming use of unoccupied channels); it shows only a small number of "unserved areas", of which the only ones of real size are northern Maine, northern New York, upper Michigan, central West Virginia and western Virginia, and southwestern Florida. Nighttime FM is in general considerably more widespread than AM primary service. Limited FM set circulation still remains a problem, although this is improving except possibly in the important auto radio market (see the Notice herein, para. 5).

[28] One of the oft-mentioned aspects of this situation is that the bulk of the nighttime "unserved area" is in the West; but the bulk of the "unserved population" is in the East and Southeast.

[29] Section 73.315(b) states that a signal as low as 50 uV/m may provide service in rural areas. However, stations have never been protected against interference out to this contour; and in Commission proceedings the 1 mV/m contour is usually the signal-intensity contour considered. Applicants are required to show the location of the 1 mV/m and the 3.16 mV/m (principal-city signal) contours.

DISCUSSION AND DECISION

49. In deciding upon the nature of the rules to be adopted in this proceeding pursuant to our proposals herein, and in the light of the comments filed, we have explored in depth approaches which would be "fine-grained"—would take into detailed account the actual distribution of aural broadcast service over the country, and result in rules aimed at remedying service deficiencies, if not on a case-to-case basis, in a manner approximating it. However it soon appeared that the body of rules necessary to mount this kind of attack on the problem would be formidably complicated, and their implementation would impose a heavy administrative burden on the Commission and on licensees and applicants—all without any firm assurance that the result, as evidenced by a more equitable and efficient distribution of broadcast facilities, would be sufficiently significant to justify the attendant effort and expense.

50. Therefore, we have abandoned this approach, and are adopting comparatively simple rules in an attempt to accomplish our objective—to control the expansion of standard broadcast service in such a manner that, in the future, grants of new standard broadcast stations or changes in existing stations will be limited largely to those situations in which improvements in the existing level of aural service are clearly needed, and cannot readily be achieved by alternative means. In following this course of action, we are rejecting the suggestions of those parties who urge that we revert to an unrestricted "demand" system—that we accept and process any standard broadcast application which meets the basic technical standards, and abandon rules tailored to limit the addition of new stations to communities which we deem to have sufficient aural service. These parties tend to argue that the tremendous number of AM stations which have been assigned under this system is a demonstration of the excellence of the system, and that "demand" can be considered as a true indicator of the public need for additional broadcast service. We do not believe that effectiveness of a system of broadcast allocations can be measured solely or even primarily by the fact that it provides an open-ended avenue for the apparently unlimited expansion in the number of stations. As we have often observed, the unrestricted operation of such a system almost inevitably results in an inequitable distribution of facilities, with an undue concentration of stations in the larger communities. Nor do we believe that "demand", as evidenced by the willingness of entrepreneurs to hazard funds for the establishment or purchase of stations is a true reflector of the public need for additional broadcast service. Typically, any of the largest cities have a multitude of aural services, and it is difficult to conceive a substantial public requirement for any greater number, yet the "demand" remains, as demonstrated by the prices commanded by standard broadcast stations which change hands in those cities. Accordingly, we find no justification for jettisoning rules designed to direct the future growth of the standard broadcast service into areas where there is inadequate existing service by any reasonable standard.

51. The major rule amendments which we are adopting are embodied in a new paragraph, which, together with pertinent notes, would be added to present Section 73.37 of the rules. This paragraph sets forth requirements bearing on the acceptability of applications in addition to the no overlap and non-interference showings presently required by the rule. A discussion of the positions advanced by the parties to this proceeding, and our reasons for adopting these particular rules, can be conducted most fruitfully if we here set forth the new paragraph, and examine its provisions and their implications in the light of the considerations involved.

52. § 73.37(e) in addition to a demonstration of compliance with the requirements of paragraph (a), and, where appropriate, paragraphs (b), (c) and (d) of this section, an application for a new standard broadcast station, or for a major change (see § 1.571(a)(1)) in an authorized standard broadcast station, as a condition for its acceptance shall make satisfactory showings as indicated below for the kind of application submitted.

(1) Application for a new daytime station, or for a change in the frequency of an existing daytime station.

(i) That at least 25 percent of the area or population which would receive interference-free primary service from the proposed station does not receive such service from an authorized standard broadcast station or receive service from an authorized FM broadcast station with a signal strength of 1 mv/m, or greater, or

(ii) That no FM channel is available for use in the community designated in the application and that at least 20 percent of the area or population of the community receives less than two daytime aural services. For the purpose of this showing an aural service shall be deemed to be provided by an interference-free groundwave signal from an authorized standard broadcast station of a strength of 5 mv/m, or greater, or by an F (50, 50) signal from an authorized FM broadcast station of a strength of 70 dbu (3.16 mv/m), or greater.

(2) Application for a new unlimited time station, for a change in the frequency of an authorized unlimited time station, or for nighttime facilities by an authorized daytime station, a satisfactory showing under (i) (except for a Class IV station), and under either (ii) or (iii):

(i) That objectionable interference at night will not result to any authorized station, as determined pursuant to § 73.182(o).

(ii) That at least 25 percent of the area or population which would receive interference-free primary service at night from the proposed station does not receive such service from an authorized standard broadcast station, or service from an authorized FM broadcast station with a signal strength of 1 mv/m, or greater, or

(iii) That no FM channel is available for use in the community designated in the application, and at least 20 percent of the area or population of the community receives less than two nighttime aural services. For the purpose of this showing, an aural service shall be deemed to be provided by an interference-free groundwave signal from an authorized standard broadcast station with a strength of 5 mv/m, or

greater, or by an F (50, 50) signal from an authorized FM broadcast station with a strength of 70 dbu (3.16 mv/m), or greater.

(3) Application by an authorized station (other than a Class IV station) proposing changes in facilities, other than a change in frequency, must make a satisfactory showing, where appropriate, under (i), and under either (ii) or (iii).

(i) For a change in nighttime facilities, that the proposed change will not result in objectionable interference to other stations as determined pursuant to § 73.182(o).

(ii) For an increase in power, either daytime or nighttime, that the authorized operation, during the portion of the broadcast day for which power increase is sought, includes less than 80 percent of the area or population of the community to which the station is assigned within its 5 mv/m groundwave contour (or within its interference-free groundwave contour, if of a higher value), or,

(iii) For an increase in power, that at least 25 percent of the area or population which, as a result of the power increase, for the first time would receive interference-free primary service from the station, is without primary service from any other standard broadcast station.

New notes appended to Section 73.37 define the circumstances controlling the availability of an FM channel, and, with respect to the determination of existing services, stipulate that signals from stations located more than 50 miles from the community for which the station is proposed will not be considered, and that co-owned FM and standard broadcast stations shall be considered as providing a single aural service. A study of the provisions of this paragraph will reveal the following additional criteria which will henceforth govern the acceptance of applications for standard broadcast stations:

(1) A showing, for a new daytime station that 25 percent of the area or population within its proposed service area is without primary service from any existing standard broadcast station, or comparable service from an FM broadcast station, and, for a new unlimited time station, that this condition exists during nighttime hours.

(2) An alternative showing that the community for which the new station is proposed receives from existing stations a degree of service which, for the purposes of this document will be referred to as "inadequate"—that the community is not substantially covered by at least two independent (not commonly owned) aural (AM or FM) services with field strengths of a level normally required to be provided by a station assigned to that community—and that an FM channel is not available to the community which might be utilized to rectify the service inadequacy. In the determination of the adequacy of existing service to the community for which the application is designed, we have further provided that signals from distant stations—that is, from stations whose transmitters are located more than fifty miles from the community—are not to be considered.

(3) Subject to the overlap and interference restrictions of 73.37 we will accept applications from existing stations for increased power within the limits permitted the class of station involved on a showing either that at least 25 percent of the newly served population or area would receive a first primary service, or that, with existing facilities,

the station does not adequately cover its community—inadequate coverage being presumed if less than 80% of the population or area of the community receives an interference-free signal of 5 mv/m or greater. For an unlimited time station, this test is applied separately nighttime and daytime, and an application for such a power increase based on inadequate community coverage is accepted only for the portion of the broadcast day during which inadequate coverage is shown.

53. The Commission has found in numerous cases that coverage of a community approximating 90% of its area or population with a signal of required strength is in substantial compliance with the service requirements of its rules. The 80% figure used herein as the minimum level for adequate coverage of its community by an existing station was chosen as a figure below which service can be deemed clearly inadequate, even in the light of existing Commission policy. For a similar reason, we have used the complement of this figure, 20 percent, as the criterion to be employed by the applicant for a new station in a demonstration of the area or population of a community unserved by existing stations.

54. It will be observed that, in the provision of aural service, we are treating FM as a full and viable partner of AM, in that we both accord existing FM service equal status with AM in the determination of whether a particular community is being "adequately" served, and, where service can be shown to be inadequate, that we point to FM as the favored means for correcting this deficiency.

55. We have given full consideration to the arguments filed in opposition to our proposal to accord a major role to FM in future endeavors to improve aural broadcast service, and have concluded that it is in the overall public interest that existing and potential FM service be relied on to the extent feasible. It is quite clear that, under the allocation practices prevailing heretofore, nighttime primary service from AM broadcast stations has not improved appreciably in areas where it is most needed, and, considering the nature of the problem, is unlikely to. FM is virtually the only means by which admittedly inadequate nighttime primary service may be improved substantially; in contrast to daytime stations, which have constituted the bulk of new standard broadcast stations authorized in the recent past each new FM station provides a new and significant nighttime service. The argument has been advanced that the typical FM station does not provide service over an area as extensive as that usually served during daytime hours by a standard broadcast station. This is certainly true if the areas within the respective 1 mv/m and 0.5 mv/m protected service contours of such stations are compared. However, we believe that this advantage of AM, as demonstrated in this manner, becomes of far less significance when service comparisons are made under actual operating conditions. At locations where the extent of service provided by the FM or an AM station is effectively limited to its protected contour by interference from other stations, there is usually a plethora of service from such stations, and wide area coverage by either station, in all probability, contributes little to the revenues received by the station or service needed by the public. In less densely populated areas, where stations are fewer

in number and more widely separated, the effective service areas of the FM and standard broadcast stations may approach comparability, since, as is widely recognized, in the absence of interference from other stations, an FM station will provide service roughly equivalent in quality to the 0.5 mv/m service from a standard broadcast station, out to its 50 uv/m contour.

56. Whether or not an FM station is less expensive to install than an AM station of comparable size (in our Notice, we asserted that this was the case, but several of the comments asserted this was not necessarily so, and offered typical cost data in support of this contention), the differential one way or another, does not appear so great as to influence our action in this matter. While it has been urged that there is still an insufficient number of sets capable of receiving FM signals in the hands of the public to make the AM and FM services fully comparable, we find that this situation is one that is rather rapidly being alleviated. For instance, EIA [30] shows for the year 1971 approximately 59 percent of all radios, other than those for automobiles, produced or imported, had FM capability. Admittedly, automobile radios which include FM constituted only about 19% of such radios produced or imported in 1971, but this percentage has risen from a figure of around 11% for the year 1968. Those opposing the adoption of rules according coequal status to FM have emphasized that an extremely important section of the aural market is the commuting public, and the small proportion of cars equipped to receive FM programs present a serious threat to the economic viability of FM stations. However, it should be noted that the rules which we are adopting generally favor the growth of stations in the smaller, and more isolated markets when existing aural service can be demonstrated to be less than adequate. In such markets extensive commuting to and from work may be expected to be relatively less important, both as to the number of persons involved and the average duration of the trip. It is urged that, in such markets, FM has had little previous acceptance, and, accordingly, the percentage of FM receivers in the hands of the general public is considerably lower than the national average. This seems essentially a "chicken and egg" proposition. Until FM service is available to these communities it is probably futile to expect that listeners will undertake to provide themselves with equipment for the reception of FM programs. The most potent impetus to the growth of the number of such receivers, is the existence of satisfactory service from FM stations. We do not believe, with the general availability of suitable receivers at reasonable prices, the fact that, in a particular instance, the radio audience has had no incentive to purchase such receivers is reason to refrain from supplying that incentive. At the present time, in excess of 2,300 FM stations are on the air, more than half the number of AM stations. This FM total, furthermore, does not include in excess of 500 non-commercial educational stations. Taking all of these factors into consideration, we are convinced that FM is ready and able to assume its full share of the burden for improving aural service to the Ameri-

[30] Consumer Electronics—1972 Annual Review—published by Consumer Electronics Group of the Electronic Industries Association.

can public. Our rules recognize this fact and assign to FM the role which it merits.

57. However, the amended rules provide that the determination of the adequacy of aural service to a community from existing stations be made without the inclusion of service which may be provided by noncommercial educational standard broadcast and FM stations. Our decision on this point has been arrived at with full recognition of the importance of the service rendered by such stations. Nevertheless, we have endeavored to tailor our rules so as to make possible the provision to each community of two "competing voices". These "competing voices" will be sources, not only of two program services, but, hopefully, will present two independent viewpoints on matters of community concern. Over 60% of the FM educational stations in the United States are Class D 10-watt stations operated by educational institutions, both at the college and secondary school levels. These stations are operated primarily for the benefit of the student body, their effective service area is very limited, and they very often are off the air during school vacation periods. Further, many of this class of stations serve primarily as training facilities to teach students the art and science of broadcasting. For these reasons, these stations are not truly voices in the community and should not be counted as such. Although other classes of educational FM stations may actually provide adequate signals to the communities to which they are licensed, they, like the Class D station, are exempted from many of the operating requirements imposed upon commercial stations. For example, educational stations have no minimum hours of operations; they are not required to provide their community of license with a minimum required field intensity; and they are not presently required to ascertain community needs and interests and provide programming to meet such ascertained needs and interests. With respect to noncommercial educational AM stations, their numbers are so small—less than 30 out of more than 4,000 AM stations—that as a practical matter, we believe that they should also be excluded from consideration. Accordingly, for the purposes herein, we will exclude such station from consideration in an assessment of existing aural service to the community. We do this with no intention of diminishing the value of educational broadcast service, which, where it exists, provides a desirable and unique bonus in available programming.

58. The rules provide that where a prospective applicant intends to rely on a demonstration that service to a community is inadequate, he must also show that no channel is available for a new FM station serving the community. A channel assigned to the community is considered unavailable if occupied by an authorized station, whether or not the station is in actual operation. If the channel is unoccupied, but applied for in that community, it is still "available", since, whatever applicant finally gains an authorization on the channel, the station will supply service to the community. A channel is also available if it is unoccupied, and can be used in the community pursuant to 73.203(b) of the FM rules (the 10–15 mile rule).

59. The FM Table is not "saturated" in the less populated areas, and we had considered the advisability, where no FM channel had been assigned to a community, or requiring, as a necessary condition for the acceptance of an application for an AM station in that community, a showing that it was not technically feasible to make such as assignment. However, we have decided that the complications involved in such a negative showing are not warranted, and we, accordingly, have determined upon the simpler formulation.

60. Also, it may be noted, we have not specified a preclusion showing in the acceptability criteria—that a station assigned to the proposed community will not preclude a more needed or more efficient assignment elsewhere. This kind of showing had been considered as particularly appropriate with respect to daytime stations, whose proliferation might limit opportunities for new unlimited time assignments, with their greater service potentiality. When we invited comments concerning the possible adoption of rules requiring such showings, we indicated we had rather strong reservations about their practicability, when considered with respect to AM allocations. While one or two of the parties who discussed this matter believed that preclusion studies might usefully be required, at least on a case-to-case basis, others opposed their employment under any circumstances. Upon further consideration of all facets of this matter, not only the many variables which affect AM signal propagation, but the kinds of decisions, both economic and engineering, which must be made concerning the use of directional antennas, decisions particularly within the purview of each applicant proposing such an antenna, we have concluded that such studies, while inevitably being complicated and costly, would still be unlikely, in most instances, to provide definitive "yes" or "no" answers to the preclusion question. Rather, the requirement for such showings would introduce a new element of uncertainty and complication in our application processing procedures which we can well do without.

61. As we proposed in our Notice in this proceeding we are requiring a showing of service to twenty-five percent unserved area or population as an application acceptability criterion for daytime proposals, and are retaining this requirement where nighttime operation is contemplated. This requirement represents an effort to channel new AM assignments to locations where each contributes materially toward the achievement of the first of the traditional service priorities—the provision of service to all of the U.S. population. While this remains a desirable aim, long experience has demonstrated that it cannot be fully achieved under a system of broadcasting where each station must be financially self-sustaining, and accordingly, must be located where population is sufficiently concentrated to provide the necessary support. Accordingly, we have offered an alternative test, applicable to both daytime and nighttime operation, which reflects our aim toward attainment of two other important priorities, the provision of first and a second locally oriented service to each community.

62. For present purposes, these priorities are observed in modified form, in that:

(1) The contributions of two aural services, AM and FM, are considered together in the satisfaction of these priorities.

(2) Existing aural services to a community, if they are of adequate strength and are provided by stations not too distant from the community, are considered to satisfy these priorities. Traditionally, the priorities have been applied with respect to stations which are assigned to the community.

63. We have already discussed our reasons for treating AM and FM as a single service in this context. Insofar as the second point is concerned, we have remarked that while the assignment of first and second stations to each community traditionally has been an important allocations objective, that many communities are very small, and the full achievement of this objective in the limited spectrum space available is not feasible. In recent years, we have placed considerable emphasis on the obligation of each station to tailor its programs to serve the needs of all substantial population segments in its service area. Thus, if a community is served with a 5 mv/m signal from a nearby AM station (or 3.16 mv/m signal from an FM station) it obviously receives a technically adequate service from that station, and, we believe, could expect that station to give adequate attention, in its programs, to the purely local concerns of the community.

64. In the determination of existing service to each community, however, we have provided that service from stations whose transmitter sites are more than fifty miles from the community be excluded, on the assumption that stations at such distances from the community could not reasonably be expected to devote a substantial part of their broadcasting time to the particular needs of the community. The choice of this distance, of course, has been, to some extent, arbitrary, but we believe it is a good compromise. As the distance of a station from a particular community increases, the likelihood that the station, as a practical matter, can give a substantial degree of attention to the specific needs of the community rapidly lessens. For instance, a station delivering a 5 mv/m signal at a distance of ten miles has a service area which is roughly $\frac{1}{25}$ of the service area of a station delivering a signal of comparable strength at 50 miles. The latter station obviously will have a very much greater number of separate communities within its service area, and would be much less able to concentrate on the needs of specific communities in that area, than would a station with more restricted service contours.

65. We were also concerned, in our aim to provide each community with two adequate aural services, that these services be "competing voices". Thus, for the purpose of the existing service determination, we have treated service rendered by commonly owned FM and AM stations as a single service. This is the only kind of common ownership situation which will be encountered in this connection, since in meeting the requirements of § 73.35 and § 73.240 of our rules, commonly owned AM stations or commonly owned FM stations would be so separated geographically that under no circumstances would the 5 mv/m contours (of AM stations) or the 70 dbu contours (of FM stations) encompass the same areas.

66. While we are adopting rules with respect to new daytime stations which are substantially more restrictive than the present rules, the rules for nighttime AM service, even though making the presence of availability of FM service as a new consideration, have been somewhat liberalized, since we have provided alternative tests for application acceptability which are the same as we have prescribed for daytime applications—rather than continuing to rely solely on a showing of proposed service to unserved area or population. In situations where FM is not available to a particular community, we are ready to accept an application contemplating a nighttime operation when it is shown that the proposed station is necessary to ensure that the community receives two adequate aural services at night, and it offers protection for other stations which our rules require. We believe a new nighttime assignment may be justified under such circumstances as an exception to a policy aimed at avoiding an undue proliferation of such assignments.

67. Some of those commenting hold that we are unduly concerned with the effect an existing service of adding new stations for operation after nightfall, and dispute our claim that each new assignment, regardless of the degree of protection offered pursuant to existing rules, imposes its modicum of interference, with some effective limitation to the service provided by existing stations. It is suggested that this, in fact, does not occur—that an older station continues to provide interference-free service to as large areas as in former years, but many of the listeners to this station are now in suburban areas, more remote from the station than previously. While they may find reception unsatisfactory, and ascribe this condition to a shrinkage in the interference-free service area of the stations, in reality their poorer reception results from the fact that they reside at more distant locations. This opinion is offered without supporting evidence, which admittedly could be developed only by a great many observations of a number of stations over a long period of time. Our own observation, offered similarly without technical support, has led us to a distinctly contrary conclusion—we believe that regional stations, in particular, despite computations made under existing rules which may demonstrate that limitations remain unchanged, have suffered a progressive deterioration in the extent of the areas over which they can provide interference-free service. If this conclusion is correct, there are at least two causes to which the effect might be ascribed—(1) that our methods of predicting interference do not fully take into account the cumulative effect of interference from many sources and (2) that the directional antennas used by most regional stations for restricting radiation toward other co-channel stations do not, in many cases, limit interference produced by skywave transmission to a degree which might be predicted from consideration of the antenna design. At least one study has been made tending to show that this can be the case—that directional antennas designed for a high degree of suppression of radiation at angles above the horizontal produce interfering skywave signals substantially exceeding those which would be predicted under the Commission's

rules.[31] This last consideration is particularly important in considering the addition of new nighttime services to already overcrowded regional channels. Stations "shoehorned" in under such conditions almost invariably require the use of directional antennas designed to radiate very little energy in various directions above the horizontal plane, so as to provide the degree of nominal protection for other stations required by the Commission's rules. If this protection is not, in fact, achieved, as it well may not be, the result is a higher level of interference to these stations than was anticipated.

68. For these reasons, and because, in general, such new stations, subject to interference from many other stations, have very limited interference-free service areas and contribute little to overall nighttime service, we will continue to restrict new nighttime assignments to those cases where they can provide clearly needed new service and there is no available alternative means for providing this service.

69. Because we recognize the problems faced by many existing stations in continuing to serve satisfactorily communities which, over the years, have expanded to geographic extent, the amended rules are framed so as to permit stations able to demonstrate that their existing community coverage is inadequate to increase power within the limits specified by our rules, subject to compliance with overlap and interference considerations. However, permissible power increases are selective—an unlimited time station will be permitted to increase power only during the portion of the broadcast day when existing community coverage is shown to be inadequate (or it can be shown that 25% of the area or population newly served as a result of the power increase would receive its first primary service). Of course, power increases permitted on such a selective basis may result in cases where some unlimited time stations are authorized to operate with higher power at night than during the daytime. While this result may be at variance to the usual situation, in which the station's daytime power is equal to or greater than its nighttime power, there appears little justification for permitting a power increase during a portion of the broadcast day for which the applicant is unable to make a satisfactory showing, pursuant to the rules, of service benefits resulting from the increase.

70. We have not adopted any rule provisions, as suggested by some of the parties, directed specifically toward making easier the acquisition of nighttime facilities by daytime stations. Indirectly, we believe we have done this, however, by upgrading the requirements for adequate service to each community from existing stations. Thus, if the licensee of a daytime station can demonstrate that no unused FM channel is available to his community, and that other stations fail to provide at least two "adequate" nighttime aural services to that community, he is eligible, if his proposal will meet the nighttime protection requirements for other stations, to apply for full time operation. However, he would not be permitted to tailor the proposed nighttime power, as Tri-State requests, to whatever level might be necessary to provide

[31] Suppression Performance of Directional Antenna Systems in the Standard Broadcast Band—FCC Office of Chief Engineer—TRR Report 1.2.7. This Report analyzes the results of skywave measurements on directional arrays made in April, 1949, by NARBA Preparatory Committee IA.

protection, with non-directional operation, for other stations. An appealing case might be made for this kind of operation in an individual instance. However, the net effect of a rule relaxation permitting such operation would be a proliferation of many low cost, but substandard nighttime facilities, generally providing inadequate service to their communities, and contributing to a level of actual (as distinguished from computed) intereference far outweighing the service benefits which they might provide.

71. As indicated in our earlier discussion of these matters, proposals for an across-the-band power increase, and involving changes in the rules governing the use of the clear channels are beyond the scope of this proceeding. Any broadening of its coverage to include such questions could result in an extension of the "freeze" on the acceptance of applications into the distant future, a result which we believe is undesired by any of the parties. We have given full consideration to those suggestions aimed at mitigating the Commission's workload in the processing applications for standard broadcast stations, and may eventually test the feasibility of certain of the ideas presented. At the present, since we are unable to forecast accurately the degree to which application filings pursuant to the amended rules will present a major problem, we intend to proceed in this area as described in paragraph 77 of this Report and Order.

72. A petition for special consideration of minority groups presents not a requirement for more stations serving the special interests of these groups (on the contrary, it is claimed that approximately 700 stations carry at least some programming directed especially to the black audience), but seeks an opportunity for new stations which are black owned. This need is seen as especially great in the larger markets, where the greatest concentrations of minority groups are found; it is also in these markets, however, where new facilities are less likely to be available, both because the plethora of existing stations diminishes the possibility of technically feasible new assignments, and because the Commission's policies are generally aimed toward precluding further additions to the many broadcast services already provided such cities. It is urged, however, that, it is only recently that the blacks' financial and social position has advanced to a degree that broadcast station ownership has become possible—meanwhile, the available assignments in these population centers have been utilized. It is further stated that the purchase of existing facilities in these markets by black groups is either not possible, or involves prices so monumentally high as to be prohibitive. Accordingly, the only practical avenue through which black ownership of broadcast facilities can be accomplished is through allocation policies which make additional assignments possible.

73. Conceding the truth of all of these allegations, and that the promotion of minority group ownership of broadcast facilities is a socially desirable end, we are unable to see how this objective may be furthered effectively in a proceeding, such as this, and within the framework of the statutory scheme which circumscribes our actions. Obviously, should we modify and relax all non-technical rules which tend to restrict additional assignments, the opportunities in general for minority controlled applicants to seek new facilities may be in-

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creased, but at the expense of basic allocation objectives, and without any real assurance that these opportunities can or will be effectively exercised. In any event, the availability of new assignment opportunities in the larger cities, in which the largest minority groups reside, is not controlled by rules such as we now adopt, but by the basic technical standards. The petitioner demonstrates this in a study appended to his filing which shows in the "top ten" markets, nearly all of the existing standard broadcast stations were assigned in these markets prior to 1950, long before the Commission became actively concerned with the undue concentration of stations in the larger population centers, and adopted rules designed to direct the future growth of stations to areas where additional service is more greatly needed. Thus, absent a revision of the standards which now define the limits of service and interference, a revision which is clearly beyond the ambit of this proceeding, there is no action the Commission could appropriately take which would further the particular objectives of the petitioner.

74. The new showings as to the extent of existing AM and FM service, and the availability of FM channels will not be required in applications for new AM broadcast facilities in Alaska, which will continue to be governed by the more liberal policies which are presently set forth in paragraph (5) of Note 2 in Section 1.571. These policies, which were adopted on an interim basis at the time of the freeze, will be made permanent. Accordingly, the substance of aforementioned paragraph (5) is being added as a new paragraph (f) to Section 73.37. Moreover, we have decided to apply these policies with respect to applications submitted for new facilities in Puerto Rico, the Virgin Islands, Hawaii, Guam and American Samoa as indicated in paragraph (f). While the aural broadcast coverage of Alaska is, of course, inadequate on an area basis, this limitation is presently imposed by economic considerations (the sparseness of population with respect to the area of the State), rather than by any scarcity in available standard broadcast spectrum space, and the restrictions which accordingly are imposed are only those intended to limit interstation interference and insure that each new assignment will contribute efficiently to the improvement in broadcast service. Hawaii and Guam are both limited in geographical extent, and so isolated from other populated areas that standard broadcast stations can be assigned with only a limited need to consider interference effects external to the particular state or territory. We see no need to apply any more restrictive rules in these cases than with respect to Alaska. While the availability of standard broadcast service in Puerto Rico and the Virgin Islands is limited primarily by their proximity to Cuba, where many stations operate, and to Haiti and the Dominican Republic, this limitation is not sufficient to preclude adequate coverage of these comparatively small islands by standard broadcast facilities assigned to the communities therein, and we do not feel justified in imposing the more restrictive standards of the new rules to these territories. While the distances of these outlying states and territories from the conterminous states vary greatly, all are sufficiently far away that assignment policies which place relatively few obstacles in the way of new daytime and unlimited time standard

broadcast assignments in these areas can have little preclusionary effect on assignments in the conterminous states.

75. Having extracted the useful substance of Note 2 to § 1.571, as above described, we are deleting this Note, thereby, in effect, lifting the "freeze" on the filing of certain categories of applications.

76. When an applicant relies on a demonstration that the existing aural service to the community which he serves or proposes to serve is inadequate as a basis for the acceptance of his application, it should be evident that his application, to be eligible for a grant without hearing, must propose an operation that itself will provide an adequate service to the community. As is well known, the Commission consistently requires that a new standard broadcast station provide an interference-free signal of 5 mv/m or greater over the entire community to which it is assigned. This long standing requirement is presently not stated directly in the rules, but may be derived from § 73.188(b)(2), which requires that the transmitter site for a proposed station be so selected that a signal of 5 mv/m minimum strength will be delivered over the most distant residential section of the designated community, read in connection with the textual material of § 73.182(f) which makes it clear that service is considered to be provided only when the signal is interference-free, which, at night, may require a signal in excess of the 5 mv/m minimum. Since this requirement bears an important relationship to the application of the new rules, we consider it desirable that it be stated clearly and directly, and we have included it, together with the concomitant requirement for a 25 mv/m signal over business areas of the community in a new paragraph added to § 73.24, a section of the rules which specifies the showings which must be made prerequisite to the authorization of a new station or an increase in the facilities of an existing station. It is recognized that, in the individual case, an existing station proposing an increase in power within the power ceiling imposed on the class of station involved, or because of interference considerations, may be unable to meet fully the service requirements discussed above. In such an instance, if the proposed operation would provide service to the community substantially superior to that provided by the existing operation, and is otherwise in compliance with the rules, the Commission will give favorable consideration to a request for waiver of the community service requirement.

77. During the year following adoption of the current AM rules in 1964, over 400 major applications were filed. This total was due in part to pent-up demand created by the "freeze" period preceding adoption of the rules. Due to this large influx and the complex nature of the studies required under the "go-no go" system, a large backlog soon developed. As the average length of time to dispose of applications grew, so did the necessity to amend and update them. Consequently, the backlog tended to become self-perpetuating. Because of a reduction in personnel available to process AM applications, the filing of new proposals in numbers even approaching the total filed subsequent to the lifting of the last "freeze" will result inevitably in another large backlog. Thus steps may be necessary to control the influx of applications. Considerable thought has been given to the design of an ac-

ceptable method to accomplish this result. We have concluded, however, that it would be premature to institute control measures at the outset, when we are unable to predict accurately the rate of incoming applications. Accordingly, at this time, no restrictions will be placed on the potential number of proposals which may be filed. If the number submitted, however, becomes administratively burdensome, we will give further consideration to the imposition of control measures. These measures will probably involve the declaration of periodic "open" and "closed" seasons for the filing of applications. If it becomes necessary to institute such measures, they will be temporary in nature, and advance notice will be given, so that all parties will have ample time to complete and submit any applications which are in preparation.

78. The amendments to the rules, as discussed herein, are set forth in the attached Appendix. The additional requirements will apply to all applications filed after the effective date of these rules.

79. Accordingly, IT IS ORDERED, That, effective April 10, 1973, Part 73 of the Rules and Regulations IS AMENDED as set forth in the Appendix hereto. Authority for this action is found in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended.

80. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX A

1. Section 1.571 is amended by redesignating Note 1 as Note and amending the text, and deleting Note 2 to read as follows:

§ 1.571 Processing of standard broadcast applications.

* * * * * * *

NOTE: No application for broadcast facilities in the conterminous United States tendered for filing after July 13, 1964, will be accepted for filing unless it complies fully with the provisions of § 73.24(b) and § 73.37(a) through (d) of this chapter, and no application for broadcast facilities in the conterminous United States tendered for filing after July 18, 1968, will be accepted for filing unless it complies fully with the provisions of § 73.24(b) and the provisions of § 73.37(a) through (e). No application for new or changed broadcast facilities in the states of Alaska, and Hawaii, the Commonwealth of Puerto Rico, and the territories of the Virgin Islands, Guam and American Samoa, tendered for filing after July 18, 1968 will be accepted for filing unless it complies fully with the provisions of §§ 73.24(b) and 73.37(a) through (f).

2. In § 73.24, par (b) & Note are amended, present par (j) becomes par (k) and a new par (j) is added to read as follows:

§ 73.24 Broadcast facilities, showings required.

* * * * * * *

(b) That a proposed new station (or a proposed change in the facilities of an authorized station) complies with the pertinent requirements of § 73.37.

NOTE: The provisions of § 73.37 shall not be applicable to new Class II–A stations or to stations for which applications were accepted for filing before July 13, 1964. With respect to such stations, the provisions of § 73.28(d), and the provisions of NOTE 1 of § 73.37 shall apply. Special provisions concerning interference from Class II–A to stations of other classes authorized after October 30, 1961 are contained in § 73.22(d) and NOTE 3 to § 73.21. The level of interference shall be computed pursuant to §§ 73.182 and 73.186.

* * * * * * *

(j) That the 25 mv/m contour encompasses the business district of the community to which the station is assigned, and that the 5 mv/m contour (or, at night, the interference-free contour, if of a higher value) encompasses all residential areas of such community.

(k) That the public interest, convenience and necessity will be served through the operation under the proposed assignment.

[§ 73.30 Amended]

3. Section 73.30 is amended by deleting paragraph (c).

4. In Section 73.37, amend the headnote & add new paragraphs (e), (f), and Notes 4, 5, 6, 7, and 8, to read as follows:

§ 73.37 Applications for broadcast facilities, showing required.

* * * * * * *

(e) In addition to a demonstration of compliance with the requirements of paragraph (a), and, where appropriate, paragraphs (b), (c), and (d) of this section, an application for a new standard broadcast station, or for a major change (see § 1.571(a)(1)) in an authorized standard broadcast station, as a condition for its acceptance, shall make satisfactory showings as indicated below for the kind of application submitted:

(1) Application for a new daytime station, or for a change in the frequency of an existing daytime station:

(i) That at least 25 percent of the area or population which would receive interference-free primary service from the proposed station does not receive such service from an authorized standard broadcast station, or receive service from an authorized FM broadcast station with a signal strength of 1 mv/m, or greater, or

(ii) That no FM channel is available for use in the community designated in the application and that at least 20 percent of the area or population of the community receives less than two daytime aural services. For the purpose of this showing an aural service shall be deemed to be provided by an interference-free groundwave signal from an authorized standard broadcast station of a strength of 5 mv/m, or greater, or by an F (50, 50) signal from an authorized FM broadcast station of a strength of 70 dbu (3.16 mv/m), or greater.

(2) Application for a new unlimited time station, for a change in the frequency of an authorized unlimited time station, or for nighttime facilities by an authorized daytime station, a satisfactory showing under (i) (except for a Class IV station), and under either (ii) or (iii):

(i) That objectionable interference at night will not result to any authorized station, as determined pursuant to § 73.182(o).

(ii) That at least 25 percent of the area or population which would receive interference-free primary service at night from the proposed station does not receive such service from an authorized standard broadcast station, or service from an authorized FM broadcast station with a signal strength of 1 mv/m, or greater, or

(iii) That no FM channel is available for use in the community designated in the application, and at least 20 percent of the area or population of the community receives less than two nighttime aural services. For the purpose of this showing, an aural service shall be deemed to be provided by an interference-free groundwave signal from an authorized standard broadcast station with a strength of 5 mv/m, or greater, or by an F (50, 50) signal from an authorized FM broadcast station with a strength of 70 dbu (3.16 mv/m), or greater.

(3) Application by an authorized station (other than a Class IV station) proposing changes in facilities, other than a change in frequency, must make a satisfactory showing, where appropriate, under (i), and under either (ii) or (iii).

(i) For a change in nighttime facilities, that the proposed change will not result in objectionable interference to other stations as determined pursuant to § 73.182 (o).

(ii) For an increase in power, either daytime or nighttime, that the authorized operation, during the portion of the broadcast day for which the power increase is sought, includes less than 80 percent of the area or population of the community to which the station is assigned within its 5 mv/m groundwave contour (or within its interference-free groundwave contour, if of a higher value), or,

(iii) For an increase in power, that at least 25 percent of the area or population which, as a result of the power increase, for the first time would receive interference-free primary service from the station is without primary service from any other standard broadcast station.

(f) Applications for new or changed facilities in the states of Alaska and Hawaii, in the Commonwealth of Puerto Rico, and in the territories of the Virgin Islands, Guam and American Samoa will be accepted for filing only if satisfactory showings are submitted with respect to the following:

(1) The proposed operation complies with the requirements of paragraphs (a), (b), (c) and (d) of this section.

(2) Unlimited time operation, by other than a Class IV facility, will not cause objectionable skywave interference at night to an existing station, pursuant to § 73.182(o). In addition, each proposal for unlimited time operation (including Class IV proposals) shall meet at least one of the following conditions:

(i) Not more than 10 percent of the population included within the normally protected nighttime contour would receive objectionable interference.

(ii) The proposed operation would be the first standard broadcast facility assigned to the community which would provide nighttime service.

(iii) For a proposed new station, that at least 25 percent of the area or population included within the nighttime interference-free primary service contour is without nighttime primary standard broadcast service, or, for a proposed change in the nighttime facilities of an authorized station, that at least 25 percent of the area or population which would receive interference-free nighttime primary service from the station for the first time as a result of the change in facilities is without nighttime primary standard broadcast service.

* * * * * * *

NOTE 4: All applications for new stations, or for major changes in existing stations tendered for filing after July 18, 1968, for facilities in the conterminous United States, shall be subject to the provisions of paragraph (e) of this section, or, for facilities in the states of Alaska and Hawaii, the Commonwealth of Puerto Rico and the territories of the Virgin Islands, Guam and American Samoa, shall be subject to the provisions of paragraph (f) of this section.

NOTE 5: In making determinations of "aural service" to the community from standard broadcast or FM broadcast stations in showings pursuant to (e)(1)(ii) and (e)(2)(iii), service provided by any standard broadcast station or FM broadcast station whose transmitter site is located more than 50 miles from the nearest boundary of the community designated in the application shall be excluded from consideration.

NOTE 6: No FM channel is available for use in the community (see (e)(1)(ii) and (e)(2)(iii)), if no channel is assigned to the community for commercial use in the FM Table of Assignments (§ 73.202(b)), as amended by Commission action as of the date the application is tendered, or, if assigned, is occupied by an authorized facility, and no unoccupied channel can be utilized to serve the community pursuant to § 73.203(b).

NOTE 7: In the determination of the extent of existing aural service to a community, areas and populations of the community receiving service from a standard broadcast station and an FM broadcast station which are commonly owned shall be considered as receiving a single aural service from these stations. Service provided by noncommercial educational FM stations and standard broadcast stations shall not be included in the determination of existing aural service.

NOTE 8: An application for a new unlimited time station, other than a Class IV station, even though including a satisfactory showing pursuant to paragraph (e)(2) of this section will not be accepted for filing if the proposed daytime power is greater than the proposed nighttime power, unless it contains an additional satisfactory showing pursuant to (e)(1) of this section for daytime hours of operation.

APPENDIX B

Parties filing comments:

Robert D. Zellmer
Oil Shale Broadcasting Co. (KWSR)
Carl Como
Heart O'Wisconsin Broadcasters, Inc.
Ralph J. Bitzer, Consulting Engineer
Waldron Broadcasting Co. (WCIR)
WPVL, Inc.
WMRR Broadcasting Co.
Ashdown Broadcasters, Inc.
Dr. Wendell Cox
Vir James, Consulting Radio Engineers
E. Harold Munn, Jr., Consulting Engineer
Gordon A. Rogers (KGAR)
William O. Barry
Community Service Broadcasters (WTCA/WTCA–FM)
L. J. duTreil and Associates, Inc., Consulting Radio Engineers
Angel M. Rivera
James R. Coursolle (KKIN)
Lloyd E. Kolbe (KVLG)
Frederick Eckardt (WCLW)
Robert Z. Morrison (KCLN)
Clearwater Radio, Inc. (WTAN)
Scott McQueen (Sconnix Radio Enterprises)
Bradley University
Hugh J. Williams
WMLP, Inc.
Tri-State Broadcasting Co. (WGTA)
Golden West Broadcasters, et al.
Cohen and Dippell, Consulting Engineers
Hubbard Broadcasting, Inc.
Mid America Audio-Video, Inc. (WKAN)
Jansky and Bailey, Consulting Engineers
Kona Koast Broadcasting Co. (KKON)
Jules Cohen and Associates, Consulting Electronic Engineers
National Association of Broadcasters
Association of Federal Communications Consulting Engineers
Carl E. Smith, Consulting Radio Engineers
Capital Broadcasting Co., Inc. (KDXE)
Sea Broadcasting Corp. (WVAB)
Westchester Corp. (WIXZ)
KITN Radio
Robert A. Jones, Consulting Engineer
Community Broadcasters Association
Progressive Broadcasting Corp. (WINU)
Hubbard Broadcasting, Inc. (Further Comments)
Jet Broadcasting Co., Inc. and WHOT, Inc. (WJET, WHOT)
National Association of FM Broadcasters
The Outlet Co. (WJAR, WDBO, WDBO–FM)
Ben F. Dawson (KAYO)
Clear Channel Broadcasting Service
Association on Broadcasting Standards, Inc.
James S. Rivers, Inc. (WJAZ)
Douglas Properties Corp. (WOIO)
Storer Broadcasting Co.
Triangle Publications, Inc. (KFRE, WFBG, WFIL, WNHC, WNBF)
Mark/Way, Inc. (KAKC, KAKC–FM)
Broadcast-Plaza, Inc. (WTIC)
Southwestern Broadcasting Co. (WAPF)
Hudson Horizons, Inc./Jersey Horizons, Inc. (WGNY, WRAN)
Silliman, Moffet, and Kowalski, Consulting Engineers
McKenna and Wilkinson
Coastal Broadcasting Co., Inc. (WDEA, WDEA–FM)
WFLI, Inc.
Robert M. Booth, Jr.
Wycom Corp. (KODI)
Kingsley H. Murphy, Jr. (WISS)
Plough Broadcasting Co., Inc. (WMPS, WCAO, WPLO, WJJD, WCOP)
KULA Broadcasting Corp, et al.
Commercial Radio Equipment Co., Consulting Engineers
KBAR–AM
John H. Mullaney and Associates, Consulting Engineers
Fetzer Broadcasting Co. (WKZO)
Cedar Valley Radio
Midwest Television, Inc. (KFMB)
WAAM
Owen G. Shinn, et al.
Gates Radio Co.
KIKX Radio
KDHN Radio
KVRH–AM
Star Broadcasting Co. (KSXX)
Norman A. Thomas (WDNT, WJSO, WENR)
WPBC AM–FM Radio
Gunnison Broadcasting Co.
KTRT Radio
KFJB and KFJB–FM
Korral Radio, Inc. (KRAL)
Southern Broadcasting Co. (KOY, KTHT, WKIX, WKIX–FM, WRVA, WRVA–FM, WSGN, WTOB)
Dairyland Broadcasters, Inc. (KEYL)
Jerome Orr

KWCO Radio
Charles Smithgall (WRGA, WAAX, WRNG)
KDBM Radio
Prairie States Broadcasting Co., Inc. (KAWL)
National Broadcasting Co., Inc.
Parties filing reply comments:
Welcome Radio, Inc. (WSLR, WOKO, KTLK)
KLCB
Robert A. Jones, Consulting Engineer
National Enterprises, Inc. (KDRY)
Midwest Television, Inc. (KFMB)
Association on Broadcasting Standards, Inc.
National Association of FM Broadcasters
Cohen & Dippell, Consulting Engineers
Coastal Broadcasting Co., Inc.
Westchester Corp. (WIXZ)
KAIR—Number One Radio, Inc.
A. Earl Cullum, Jr. and Associates, Consulting Engineers
KPOP Radio

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

The Commission majority today ends its four year "freeze" on new or increased AM services. In doing so, and agreeing to accept new applications once again, they insure that the current garbled reception experienced by most of us on our AM band will soon be suitable only for the uses of John Cage and our other electronic musicians.

We must assume from the language of the majority's document that they contemplate additional night-time AM service in many regions of this country. If that is the case, then the more rigid "tests" or "requirements" they announce of "no locally available service," "expanding suburbs" or "FM channel availability" are little more than illusory means to a continued destruction of the "public convenience, interests or necessity."

To agree to accept new AM applications or applications for increased service from existing standard stations on theories of "need" for first or second local service, when it is acknowledged that, even absent "shortspace" violations, existing ground and skywave patterns will be disrupted by each new signal, is to do an extreme disservice to a great many listeners for the momentary convenience of a few. I say "momentary" because even the benefits of a new low power AM service to a relatively sparsely populated region would disappear as still more stations are added or services increased in other parts of the country.

I would much prefer to see a vigorous effort to increase FM usage and penetration in those less populous or rapidly growing regions where the majority today announces its willingness to reopen the AM band. The majority claims its new rules (which are admittedly even less severe than those we originally suggested might one day replace the freeze) will give an added filip to FM broadcasting. But if this Commission is *truly* committed to the full utilization of FM and the prevention of any further interference in the clear-channel dominated night-time AM band, it would not countenance the least backsliding from its admirable 1968 position to channel *all* new services into the FM band.

Surely it would not be difficult to write legislation, similar to that which has so aided UHF penetration, which would require all newly

manufactured radios to contain FM as well as AM tuners. And that is just one way of putting the full weight of this Commission behind a full-service AM–FM radio commitment. Glowing language to the contrary, however, reopening the AM band once again to additional applications unfortunately does not evince a sufficient commitment to FM to elevate it from its current status as a second class citizen in many parts of this country.

I have consistently opposed the increases in interference in aural reception that have been caused, first in AM and more recently even in FM, by waivers of our various technical rules and by the inadequacies of the rules themselves. See my numerous shortspacing dissents, e.g., *WHLN*, — F.C.C. 2d — (decided December 14, 1972); *Storer Broadcasting Co.*, 12 P & F Radio Reg. 2d 815 (1968). The AM freeze was a fresh breath of reason and sanity amidst the normal regulation-by-deterioration that constitutes the traditional approach of this Commission to the radio frequencies—but before we have time to breathe clearly long enough to assess its effect, we find it is being eliminated. I dissent.

SEPARATE STATEMENT OF COMMISSIONER RICHARD E. WILEY

The Commission announces today what I regard as a carefully structured plan designed to improve aural service, both daytime and nighttime, in communities where service is presently absent or inadequate.

Contrary to Commissioner Johnson's view, I do not believe that the creation of a limited opportunity for new nighttime AM service in underserved areas, or the improvement of existing facilities which are no longer adequate because of burgeoning population growth and urban expansion, will lead to increased and unacceptable disruptions to our present broadcast service. In this connection, it should be noted initially that, in every circumstance where new or improved aural service is proposed, we will continue to consider the availability of FM as the primary means of remedying service deficiencies. Moreover, the clear import of our Report and Order is that the introduction of new standard broadcast transmission stations, as well as the upgrading of existing facilities, will be permitted only after a satisfactory showing that objectionable interference will not result (see Sections 73.87(e)(2)(i), 73.87(e)(3)(i) and 73.87(f)(2)). Let us be very clear on this point: the Commission's action effects absolutely no relaxation of our present rules controlling the level of interference between stations.

Accordingly, our partial lifting of the AM freeze seems to me to be an intelligent, carefully measured and altogether salutary administrative response to legitimate and pressing needs for broadcast service in areas presently unserved or inadequately served, while in no way diminishing the Commission's long-standing requirement that new or expanded service shall not result in objectionable interference. Thus, it seems to me that the Commission's action clearly serves the public interest.

F.C.C. 73-188

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re:	
CERES CABLE CO., INC., CERES, CALIF.	CAC-313 CA434
CERES CABLE CO., INC., STANISLAUS COUNTY, CALIF.	CAC-314 CA435
For Certificates of Compliance	

MEMORANDUM OPINION AND ORDER

(Adopted February 14, 1973; Released February 22, 1973)

BY THE COMMISSION: COMMISSIONER H. REX LEE CONCURRING IN THE RESULT; COMMISSIONER REID ABSENT.

1. On April 28, 1972, Ceres Cable Company, Inc., filed the above-captioned applications (CAC-313, CAC-314) for certificates of compliance for new cable television systems at Ceres, California, and in adjoining Stanislaus County, California, within a five mile radius contiguous to the City of Ceres. The proposed system will operate with 20 channel capacity to offer the following California television signals: KTVU (Ind.), Oakland; KCRA-TV (NBC), KOVR (ABC), KVIE (Educ.), and KTXL (Ind.), Sacramento; KHBK-TV (Ind.), Sand Francisco; KXTV (CBS), Stockton; KGSC-TV (Ind.), San Jose [1]; and KLOC-TV (Ind.), Modesto. Public notice of the filing of these applications was given May 17, 1972. On June 16, 1972, Kelly Broadcasting Company, licensee of Station KCRA-TV, Sacramento, California, filed an "Objection of Kelly Broadcasting Company to Application for Certificate of Compliance," and Great Western Broadcasting Corp., licensee of Television Broadcast Station KXTV, Sacramento, California, filed an "Objection of Great Western Broadcasting Corp. Pursuant to Section 76.17," both directed against grant of the above-captioned applications. On August 7, 1972, Ceres amended its applications, and public notice of the amendments was given August 31, 1972. Further amendments were filed October 17, 1972; November 14, 1972; December 12, 1972; and January 19, 1973.

2. In its Objection, Kelly Broadcasting alleges: (a) that carriage of KNTV—an out-of-market network station—would violate Section 76.61 of the Commission's Rules, and (b) that Ceres' franchise establishes a fee of 5% of gross receipts which exceeds the limits established in Section 76.31 of the Rules. In its Objection, Great Western alleges:

[1] Ceres initially proposed carriage of KNTV (ABC), San Jose, but amended its proposal August 7 to specify KGSC-TV. On October 16, 1972, Ceres deleted its proposal to carry KGSC-TV.

(c) that carriage of KNTV is inconsistent with the rules; (d) that Ceres' franchises are inconsistent with the rules because: (1) they do not contain a recitation that they were awarded in a manner consistent with Section 76.31 of the Rules; (2) they do not contain a requirement relating to extension of service as provided for in Section 76.31 of the Rules; (3) they are for too long a term; (4) they do not provide an adequate complaint procedure; (5) they do not provide for changes required by the Federal Communications Commission and thus are inconsistent with Section 76.31(a)(6) of the Rules; and (6) the franchise fees exceed the 3% maximum permitted absent a special showing; (e) that Ceres has not adequately explained its access channel plans as required by Sections 76.13(a)(4) and 76.251 of the Rules; (f) that Ceres has not proposed to provide the educational access channel required by Section 76.251(a)(5) of the Rules; and (g) that any grant of these applications should be conditioned on compliance with the program exclusivity rules.

3. We rule on the objections as follows: (a)(c) This objection was mooted when Ceres deleted its proposal to carry KNTV; (b) The franchises here involved were granted before March 31, 1972,[2] and therefore qualify despite 5% fees since they show the substantial compliance with our rules which is permitted until March 31, 1977. E.g. *CATV of Rockford, Inc.*, FCC 72–1005, 38 FCC 2d 10; (d)(1) We find an adequate substitute for the franchise recitation in Ceres' unchallenged assurance that the "initial franchise was granted in public session by the respective councils"; (2) commitment is made that significant construction will be completed within one year; (3) the term of the franchises must be modified by March 31, 1977, and is therefore acceptable under the substantial compliance test; (4) Ceres undertakes to investigate and attempt to resolve subscriber complaints and states that it will maintain a local office; (5) The City of Ceres has advised that the franchise will be brought into compliance with Commission requirements; (6) This issue is disposed of in (b) above; (e) an acceptable showing of access plans is made in Ceres' amendment of January 19, 1973. E.g. *Viking Media Corporation*, FCC 72–875, 37 FCC 2d 605, 606; (f) This problem was mooted by Ceres' amendment of December 12, 1972, which provides for such a channel; and (g) cable television operators are expected to comply with the requirements of the Commission's rules; however, we have no requirement that the certificating process be used to impose the type of condition here requested.[3]

In view of the foregoing, the Commission finds that a grant of the above-captioned applications would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Objection of Kelly Broadcasting Company to Application for Certificate of Compliance" filed June 16, 1972, IS DENIED.

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[2] The franchise involved in CAC–313 was granted March 27, 1967. The ordinance involved in CAC–314 was adopted April 10, 1970.

[3] Nonetheless, Ceres' failure to respond to this objection must be treated as a waiver of any later claim to a stay pursuant to Section 76.97 of the Rules.

IT IS FURTHER ORDERED, That the "Objection of Great Western Broadcasting Corp. Pursuant to Section 76.17" filed June 16, 1972, IS DENIED.

IT IS FURTHER ORDERED, That the above-captioned applications (CAC–313, CAC–314) of Ceres Cable Company, Inc., filed April 28, 1972, ARE GRANTED and appropriate certificates of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-83

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 15 OF THE COMMISSION'S RULES TO REGULATE THE OPERATION OF A CLASS I TV DEVICE—A NEW RESTRICTED RADIATION DEVICE WHICH PRODUCES AN RF CARRIER MODULATED BY A TV SIGNAL and AMENDMENT OF PART 1 TO PROVIDE A FEE SCHEDULE FOR TYPE APPROVAL OF SUCH DEVICES	Docket No. 19281

ORDER

(Adopted January 18, 1973; Released January 19, 1973)

BY THE COMMISSION: COMMISSIONER H. REX LEE ABSENT.

1. Prior to adopting the Report and Order [1] in the subject Docket, the Commission waived §§ 2.805 and 15.7 of our Rules to permit several companies to legally market Class I TV devices. These devices were first tested at our laboratory and found to comply with the technical standards proposed [2] for such equipment.

2. The waivers granted to these manufacturers, to permit the sale and shipment of these devices, were to originally terminate on the effective date of the Rules adopted in this proceeding. The rules adopted specify type approval (equipment to be submitted to the Commission for testing) as a prerequisite for marketing Class I TV devices. Therefore, the waivers were extended to March 1, 1973, in the Report and Order to provide the necessary time for the manufacturer to procure type approval for devices currently being marketed under waivers granted.

3. The Commission has received a Petition for Reconsideration from the Matsushita Electric Corporation of America, 200 Park Avenue, New York, New York 10017, requesting a further extension of the termination date of the waiver of §§ 2.805 and 15.7, which permitted marketing of Class I TV devices and simultaneously requesting an extension of the effective date of § 15.407 of our Rules. Section 15.407 requires a Class I TV device to be equipped with a receiver

[1] Docket 19281, Order adopted December 6, 1972 (37 F.R. 26601).
[2] Docket 19281, Notice of Proposed Rule Making, adopted July 14, 1971 (36 F.R. 13793). Second Notice of Proposed Rule Making, adopted September 8, 1971 (36 F.R. 18656).

transfer switch having 60 dB isolation; this switch requirement was not included in the proposed rules for Class I TV devices. Matsushita states that unless their Petition for Reconsideration is granted it will "necessitate discontinuance of production and scrapping of considerable transfer switches which have not been designed to embody 60 dB isolation." The petitioner also claims that the March 1, 1973, termination date for waivers does not provide adequate time in which to produce a Class I TV device which complies with our Rules.

4. Matsushita requests that the effective date of § 15.407 and the termination date of the waiver be extended until July 1, 1973. The Commission finds that the schedule presented by Matsushita for development and design, type approval, and manufacturing procurement to support this request is reasonable and provides for an orderly incorporation of the receiver transfer switch as part of Class I TV devices. The Commission further finds that retaining the effective date of January 19, 1973, would work a hardship on the manufacturers of Class I TV devices and that extending this date for six months would be in the public interest. The effective date of the rules for Class I TV devices, Subpart H of Part 15, is hereby extended to July 1, 1973.

5. No action is required with respect to the waivers, since these waivers, by their terms, are valid until the final rules for Class I TV devices become effective, which is now July 1, 1973. The waivers are thus automatically extended by this action.

6. In view of the foregoing, IT IS ORDERED that the above described petition is granted and the effective date of the Rules adopted in the Report and Order in this proceeding be extended until July 1, 1973.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73R–85

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
COLORADO WEST BROADCASTING, INC., GLENWOOD SPRINGS, COLO.	Docket No. 19588 File No. BPH–7646
GLENWOOD BROADCASTING, INC., GLENWOOD SPRINGS, COLO.	Docket No. 19589 File No. BPH–7707
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted February 21, 1973; Released February 23, 1973)

BY THE REVIEW BOARD:

1. Before the Review Board is a petition to enlarge issues, filed October 13, 1972, by Colorado West Broadcasting, Inc. (Colorado West), requesting the addition of staffing and *Suburban* issues against Glenwood Broadcasting, Inc. (Glenwood).[1]

STAFFING ISSUE

2. In support of its first request, Colorado West points out that Glenwood proposes to operate its station 126 hours per week with a staff of six persons; that an exhibit filed in lieu of Section IV of Glenwood's application reveals a proposal to "add two additional employees . . . [a]t least one of [whom] will probably be full time"; and that with only 13½ hours of program duplication of its commonly-owned standard broadcast Station KGLN in Glenwood Springs, Glenwood "apparently" intends to utilize the four full-time and two part-time staff of KGLN together with "1½" prospective employees, to broadcast 112½ hours of separate FM programming.[2] Colorado West cites *Regal Broadcasting Corp.* (*WHRL–FM*), FCC 68R–386, 14 RR 2d 287, where it alleges, under an almost identical staffing and hours-of-operation proposal, and with a large percentage of local programming, a staffing issue was added. Petitioner characterizes Glenwood's staffing proposal as "so vague that it raises grave doubts" as to the possibility of its effectuation. The Broadcast Bureau opposes the addition of a staff adequacy issue primarily on the grounds that petitioner failed to submit supporting affidavits of individuals with personal knowledge, and would distinguish *Regal* as involving programming much more varied and having larger amounts of local

[1] Also before the Board are the following related pleadings: (a) Broadcast Bureau's opposition, filed November 1, 1972; (b) Glenwood's opposition, filed November 3, 1972; and (c) Colorado West's reply, filed November 13, 1972.

[2] This, Colorado West asserts, is in addition to an "average of approximately 70–84 hours" that KGLN currently operates per week.

programming more complex and unusual than that proposed by Glenwood.

3. In opposition, Glenwood accuses Colorado West of making a variety of unsupported assumptions with regard to its staff. It attempts to illustrate that each employee will "contribute considerable time" to the proposed FM operation, and submits that the efficacy of its proposal is bolstered because the studio and transmitter locations for the AM and proposed FM stations are the same. Finally, Glenwood, like the Broadcast Bureau, finds the proposal discussed in Regal disparate from its own proposal; therefore, the case is not, according to Glenwood, precedent for adding an issue here. Colorado West's reply contrasts Glenwood's staff proposal in its application and that in the opposition pleading, concluding that the inadequacy is compounded by conflicting and confusing representations.

4. In the Board's view, an adequacy of staff issue is not warranted. Colorado West's allegations are not supported by affidavits of a person or persons having personal knowledge, as required by Section 1.229(c) of the Commission's Rules. Moreover, Colorado West's pleadings do not contain specific allegations of fact which are sufficient to support its contention that Glenwood's proposal is inadequate. *Tri County Broadcasting Co.*, 27 FCC 2d 1013, 21 RR 2d 380 (1971).[3] We also agree with the Broadcast Bureau and Glenwood that *Regal Broadcasting Corp.*, *supra*, is factually dissimilar from this case. Glenwood's programming proposal is not nearly as ambitious as that proposed in *Regal*,[4] and, in our opinion, Glenwood's staffing arrangements appear to be adequate to effectuate its proposed operation.

SUBURBAN ISSUE

5. Next, Colorado West asserts that Glenwood's ascertainment efforts fail to comply with the *Primer*,[5] in that the applicant neglected to determine the current number of "foreign stock," and emphasized business oriented interests, while disregarding youth, ethnic and racial minorities and educational leaders, who, Colorado West argues, constitute significant groups in the Glenwood Springs community. Since significant segments of the population were not included, petitioner argues, the survey is unrepresentative and, hence, invalid, citing *North American Broadcasting Co., Inc.*, 21 FCC 2d 631, 18 RR 2d 452 (1970). The Broadcast Bureau opposes the request on the grounds that, "[a]side from the bare allegations of petitioner, herein, there is no showing and no supporting data that a significant group has been omitted from Glenwood's survey" as delineated in the *Primer*.[6]

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[3] See also our recent Memorandum Opinion and Order in this proceeding (FCC 73R–72, released February 9, 1973), where we refused to add a staffing issue against Colorado West because, among other reasons, Glenwood, the petitioner, failed to comply with Section 1.229(c) of the Rules.

[4] Glenwood proposes primarily recorded music, 13% news (most of which will be duplicated), 1.03% public affairs and 5.5% other (part of which will also be duplicated).

[5] *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650, 21 RR 2d 1507 (1971).

[6] The Bureau is apparently referring to paragraph 32 and the answer to question 10 wherein the Commission specified that the determination of what significant groups comprise the community "may be challenged on a showing, including supporting data, that a significant group has been omitted." 27 FCC 2d at 663, 683, 21 RR 2d at 1521, 1543.

6. Glenwood, in opposition, condemns the petition as defective in that it fails to assert that Glenwood's community profile is inaccurate; that the ascertainment does not reflect the needs of the residents in the proposed service area; and that the proposed programming is unresponsive to those problems and needs. Glenwood maintains that two directors of the local Boys Club were among the community leaders contacted and that "it is readily apparent that their relationship with youth would lead to an awareness on their part of the problems of young people." [7] Glenwood also points out that two officials of nearby Colorado Mountain College were included in their survey. With respect to the charge of disregarding minorities, Glenwood states that Commission policy sanctions an applicant's efforts to reasonably determine the significance of a particular group. Glenwood maintains that petitioner has acknowledged that the community is "very homogeneous",[8] and that the *Primer* [9] supports its contention that, while size is not the sole touchstone of a group's significance, numbers are an important factor. Therefore, Glenwood argues, its determination that the Spanish-American population lacks significance within the meaning of the *Primer*,[10] is both reasonable and determinative, without additional data to the contrary. Glenwood accuses Colorado West of finding "no ascertained problem as they specifically affect Hispano-Americans and propos[ing] no programming in either English or Spanish to meet the particular needs of this small population segment," while Glenwood proposes to simulcast a Spanish language religious program which is currently broadcast on its AM station.

7. The Review Board will not add a *Suburban* issue against Glenwood. In our view, Colorado West has failed to raise any serious questions which would require an evidentiary inquiry into Glenwood's ascertainment efforts. Not only has Glenwood adequately rebutted petitioner's allegations, but our examination of the applicant's survey indicates consultation with a representative cross-section of what appears to be a homogeneous population, despite the ethnic origins of some of the people.[11] Glenwood appears to have made a good faith effort to inform itself of area problems and has demonstrated an intention to respond to Community needs. *Greenfield Broadcasting Corp.*, 30 FCC 2d 774, 22 RR 2d 497, vacated on other grounds 32 FCC 2d 135 (1971).[12] Neither does Glenwood's programming proposal reveal on its face a

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[7] Glenwood points out that one of the needs elicited from its survey was for a recreation center for teenagers, and underscores the validity of this reflected need by indicating that the very same response is found in Colorado West's survey.

[8] Of the 4,084 persons within Glenwood's proposed 1 mv/m contour, 123 persons, or three percent, are characterized as ethnic and/or racial minorities. 1960 population figures indicate that 14.2% of the county population are of "foreign stock," but apparently no parallel 1970 Census figures are available.

[9] 27 FCC 2d at 660 n. 8, 21 RR 2d at 1518.

[10] Glenwood points out that Colorado West, in an exhibit to its application, states that the majority of the three percent are Spanish-Americans.

[11] While not specifically required by the *Primer*, Glenwood has not submitted a list of the members of the general public surveyed. Such a list would facilitate consideration of a challenge to the applicant's ascertainment efforts, but because of the homogeneous population and because the allegations of the petitioner are merely conclusory and unsupported, the Board has no reason to question Glenwood's representation of conducting a broad, cross-sectional survey.

[12] Petitioner argues in its reply that Glenwood proposes to simulcast a Spanish language religious program over its FM station which it now broadcasts on KGLN without having determined the need for it. In our view, this is immaterial and does not raise a serious question warranting a hearing.

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lack of awareness of and responsiveness to the needs and problems of the various segments of Glenwood Springs. Indeed, the Commission recognizes that minority interests may be adequately served by programming having a wider range of appeal. *Cf. WKBN Broadcasting Corp.*, 30 FCC 2d 958, 22 RR 2d 609 (1971). The Board also agrees with Glenwood that *North American*, *supra*, is inapposite. The applicant in *North American* proposed to serve 30,000 persons, conducted only 28 interviews eliciting mostly program preferences, failed to interview any members of the 23% black populace and neglected to survey the general public. In contrast, Glenwood surveyed 24 community leaders and 40 members of the general public out of a homogeneous population of 4,084 persons. Since petitioner has failed to show that Glenwood has not selected community leaders representative of significant groups, its determination in this regard will not be questioned. *The Evening News Association*, 35 FCC 2d 366, 24 RR 2d 667 (1972).

8. Accordingly, IT IS ORDERED, That the petition to enlarge issues, filed October 13, 1972, by Colorado West Broadcasting, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-168

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
AMENDMENT OF SECTION 13.70 OF THE COMMISSION'S RULES CONCERNING COMMERCIAL RADIO OPERATORS

ORDER

(Adopted February 14, 1973; Released February 20, 1973)

BY THE COMMISSION: COMMISSIONER REID ABSENT.

1. Section 13.70 of the Commission's Rules establishes prohibitions against fraudulent practices relating to commercial radio operator licenses.

2. The rule initially provided that "No licensed radio operator or other person shall obtain or attempt to obtain or assist another to obtain an operator's license by fraudulent means." By Order in Docket 14401, released March 29, 1962, (FCC 62-325, 27 FR 3203), the Commission amended Section 13.70 and extended the prohibition to include the alteration or duplication of a commercial radio operator license as well as the obtaining of the same by fraudulent means. Inadvertently omitted however, was the appropriate reference with respect to an "attempt" to obtain such license by fraud, notwithstanding that the same was included in the original rule and is provided for in Section 303(m)(1)(F) of the Communications Act.[1] Section 13.70 will therefore now be amended to include the omitted statutory language.

3. No general notice of proposed rule making under the Administrative Procedure Act is required as the amendment is reiterating what is already a statutory provision. Authority for this amendment is contained in §§ 4(i), 303(m) and 303(r) of the Communications Act of 1934, as amended.

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[1] Section 303 provides in pertinent part as follows:
Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall—

* * * * * * *

(m)(1) Have authority to suspend the license of any operator upon proof sufficient to satisfy the Commission that the licensee—

* * * * * * *

(F) Has obtained or attempted to obtain, or has assisted another to obtain or attempt to obtain, an operator's license by fraudulent means.

4. Accordingly, IT IS ORDERED, That effective March 28, 1973, Part 15 IS AMENDED as set forth below:

§ 13.70 Fraudulent Licenses.

No licensed radio operator or other person shall alter, duplicate, or fraudulently obtain or attempt to obtain, or assist another to alter, duplicate or fraudulently obtain or attempt to obtain an operator license. Nor shall any person use a license issued to another or a license that he knows to be altered, duplicated, or fraudulently obtained.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-18

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by
COMMUNICATIONS SATELLITE CORP.
For Extension of Authority Re Services
to NASA

JANUARY 4, 1973.

COMMUNICATIONS SATELLITE CORP.,
950 L'Enfant Plaza SW.,
Washington, D.C. 20024

GENTLEMEN: This is in reference to your letter of December 27, 1972, requesting an extension from December 31, 1972 to January 31, 1973 of your authority to provide satellite communications service directly to NASA in support of NSC/NASCOM. On December 29, 1972 the Commission granted an extension of your authority through Friday, January 5, 1973, pending further consideration of your request.

NASA has written to the Commission supporting the request for a one month extension as necessary in order to permit completion of its procurement actions for transfer of the service to another carrier. NASA also advises us that it will lose "unrecoverable data from our scientific spacecraft" if the service from Comsat is not continued during the time necessary to complete transfer of the service to another carrier. OTP has also submitted a letter supporting your request for a one month extension of time to serve NASA directly.

After considering all of the circumstances, we have concluded that it would not be in the public interest to interrupt the service, and we are accordingly authorizing Comsat to continue to provide services directly to NASA through January 31, 1973.

Commissioner Johnson concurs in the result.

BY DIRECTION OF THE COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73R-89

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of COSMOPOLITAN BROADCASTING CORP., NEWARK, N.J. For Renewal of Main, Auxiliary and SCA License for WHBI(FM)	Docket No. 19657 File No. BRH-1359 BRSCA-746

MEMORANDUM OPINION AND ORDER

(Adopted February 23, 1973; Released February 27, 1973)

BY THE REVIEW BOARD:

1. Cosmopolitan Broadcasting Corporation, whose application for renewal of license has been designated for hearing on various issues some of which relate to its performance in broadcasting foreign language programs, requests that the issues be enlarged to allow a determination to be made whether its programming has been meritorious "particularly with regard to programs designed to serve the needs and tastes of ethnic minorities within the station's service area." [1]

2. The addition of a meritorious programming issue is warranted, as indicated by the cases cited by petitioner and the Bureau. However, the issue as proposed departs from the wording used in these cases, and the Board is unable to agree with petitioner's argument in support of the change. The customary issue does not limit an applicant's showing to public service programming, it only emphasizes the importance of programs of this type. Therefore, Cosmopolitan will have the opportunity to offer evidence on the ethnic oriented phases of its past programming; but these programs do not automatically qualify as meritorious because they have been "designated" to serve the needs and tastes of ethnic minorities.[2]

3. As the Board has consistently held, the showing made under the new issue must be limited to the licensee's performance before it learned that its license was in jeopardy, and the parties are free to argue the weight which should be accorded such evidence. *Western Communications Inc.*, —— FCC 2d —— 1973 (FCC 73R-1).

4. Accordingly, IT IS ORDERED, That the petition to enlarge issues, filed by Cosmopolitan Broadcasting Corporation, IS GRANTED to the extent herein indicated and otherwise IS DENIED, and that

[1] The petition to enlarge issues was filed January 11, 1973; the Broadcast Bureau filed its comments on January 22, 1973; the petitioner's response was filed January 29, 1973.

[2] Thus, the Board specifically does not hold that foreign language and ethnic programs are to be viewed as public service programs if, regardless of their specific classification for logging purposes, they serve the needs of ethnic minorities.

the issues herein ARE ENLARGED by the addition of the following issue:

> To determine whether the programming of Station WHBI(FM) has been meritorious, particularly with regard to public service programs.

5. IT IS FURTHER ORDERED, That the burdens of proceeding with the introduction of evidence and proof under the issue added herein SHALL BE on Cosmopolitan Broadcasting Corporation.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73R-88

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
EASTERN BROADCASTING CO., HARLAN, KY.	Docket No. 19614
For Construction Permit	File No. BP-17817
RADIO HARLAN, INC. (WHLN), HARLAN, KY.	Docket No. 19615
For Renewal of License	File No. BR-1129

MEMORANDUM OPINION AND ORDER

(Adopted February 23, 1973; Released February 27, 1973)

BY THE REVIEW BOARD:

1. Before the Review Board for consideration is a petition to enlarge issues, filed November 10, 1972, by Radio Harlan, Inc. (WHLN),[1] in which the petitioner seeks the addition of a cost estimates issue against Eastern Broadcasting Company (Eastern) and a comparative programming issue.

2. As amended,[2] Eastern's financial proposal includes a bank loan commitment in the amount of $100,000.00. Therefore, even if the Board were to accept WHLN's contention that Eastern will have a total cash requirement of some $92,525.00, the proposed bank loan would provide an available cushion of several thousand dollars to the applicant. It is thus apparent that no useful purpose would be served by inquiring into Eastern's cost estimates. Nor does the fact that an availability of funds issue has been specified against Eastern necessitate a different conclusion. Eastern's financial qualifications will stand or fall on its ability to demonstrate that the proposed bank loan is, in fact, available, regardless of whether petitioner's allegations regarding costs are accurate. See *Snake River Valley Television, Inc.*, 18 FCC 2d 70, 16 RR 2d 442 (1969). The request for a cost estimates issue will therefore be denied.

3. In order to support a request for a comparative programming issue a proponent is required to make a *prima facie* showing that there are significant differences between the programming proposed by the applicants, and that its claimed superiority in program planning is related to ascertained community needs. *Chapman Radio and Television Company*, 7 FCC 2d 213, 9 RR 2d 635 (1967). The showing should clearly indicate the relationship between the petitioner's own

[1] Other related pleadings before the Board for consideration are: (a) supplement, filed November 13, 1972, by WHLN; (b) opposition, filed December 4, 1972, by Eastern; (c) Broadcast Bureau's opposition, filed December 4, 1972; and (d) reply, filed December 20, 1972, by WHLN.

[2] An amendment tendered by Eastern on November 28, 1972, was accepted by the Administrative Law Judge by Order, FCC 72M-1545, released December 14, 1972.

ascertainment of community needs and the reflection of those needs in the substantially greater amount of time, effort and resources proposed to be devoted to certain of the categories of programming. WHLN, in its pleading, relies upon two allegations: (1) that it proposes to devote substantially more time—both absolutely and proportionately—to the category of public affairs programming than Eastern; [3] and (2) that, as shown in its pending renewal application and actual past broadcast record, it is proposing a wide variety of public affairs programming which is reflective of the problems unearthed in its ascertainment efforts; in contrast, WHLN characterizes Eastern's proposal as a "barebone public affairs package that reflects little imagination and no real sensitivity to local problems." The Board is of the view that petitioner has failed to adequately demonstrate that the difference in public affairs programming is not merely the result of differences in judgment.[4] Thus, petitioner has not shown that the greater amount of time it proposes to devote to public affairs programs is related to greater responsiveness to its ascertained needs and interests of the community. As pointed out by the Broadcast Bureau, in its opposition, WHLN has not, except for two programs, set forth how its proposed programming is designed to meet the local needs and problems it has ascertained, and some of the programs categorized as public affairs do not appear to fall within the definition set forth in Section 73.112(d)(1) of the Rules. As a result the Board agrees with the Bureau that WHLN has failed to allege sufficient facts to meet the threshold showing required by *Chapman Radio and Television Company, supra.*

4. Accordingly, IT IS ORDERED, That the petition to enlarge issues, filed November 10, 1972, by Radio Harlan, Inc. (WHLN), IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[3] WHLN alleges that it proposes to devote 6 hours and 58 minutes or 7.83% of its total broadcast time to public affairs; Eastern proposes to devote 2 hours and 20 minutes or 2.4% (according to Broadcast Bureau calculations) of its broadcast time to public affairs. By Order, FCC 73M–204, released February 14, 1973, the Administrative Law Judge (ALJ) accepted an amendment to Eastern's *Suburban* showing: the ALJ noted, however, that Eastern would not claim any preference under the contingent comparative issue, as a result of acceptance of the amendment.

[4] The Board notes that, although WHLN proposes to devote greater amounts of time to the public affairs category, it does not fare so well in comparison with Eastern in the categories of news and all other programming exclusive of entertainment and sports. For example, Eastern proposes to devote 10 hours and 55 minutes or 13% of its broadcast week to news, whereas WHLN proposes to devote 8 hours and 22 minutes or 9.4% of its broadcast week to news.

F.C.C. 73-135

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
ACTION FOR CHILDRENS TELEVISION, INC., NEWTONVILLE, MASS.
Concerning Fairness Doctrine Re National Association of Broadcasters

JANUARY 31, 1973

MS. EVELYN SARSON,
Executive Director,
Action for Childrens Television, Inc.,
46 Austin Street, Newtonville, Mass. 02160

DEAR MS. SARSON: This refers to the complaint filed by Action for Childrens Television (ACT) regarding an announcement distributed to television stations by the Television Information Office (TIO) of the National Association of Broadcasters.

Your letter to the Commission and enclosures indicate the following:

1. TIO distributed to television stations in August or September 1971 a one-minute announcement titled "Do Children Learn from Television?", a copy of which you have forwarded to the Commission and which is attached hereto. The announcement portrayed five children stating what they had learned from television, e.g., "how to cook hamburgers," "about pollution and what they're doing about it." "three specific things I'm never going to take—alcoholism, smoking and bad drugs."

2. In November 1971 ACT sent a memorandum to 133 television stations in the top 25 markets, stating that the TIO announcements discussed a controversial issue of public importance—"The issues of the quality and effects of children's television". ACT asked how often and at what times the stations had carried or would carry the TIO spot, what other discussions of the children's television issue they had carried, and "how you intend to discharge your Fairness Doctrine responsibilities." ACT offered to provide the stations with a public service announcement presenting another view on the issue. In support of its contention that the announcement discussed a controversial issue, ACT cited portions of an article in the September 1971 issue of the TIO newsletter, which stated in part,

> Too often, TV's critics fail to give credit to the medium for positive values it presents. TIO's new 60-second color spot offers a charming, low-key response to some of those critics.

ACT's memorandum to the TV stations cited the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Business Executives' Move for Vietnam Peace* v. *FCC*, as stating that a format of spot announcements for discussion of public issues "has great potential for enlivening and enriching debate," since it presents arguments in an "uninhibited wide-open fashion."

3. ACT states that as of January 1972 it received 35 replies, 21 stating that the stations had not aired the TIO spot, 11 stating that the stations had aired the spot, and three others requesting "ACT's counterspot while not admitting whether or not they had aired the TIO spot." ACT states further that it sent a set of three slides and a 30-second script to all stations that had requested the ACT spot or had broadcast the TIO spot. Letters ACT has forwarded from two stations stated that "because it seems to us beyond dispute that children (as well as others) learn from television" they did not understand ACT's assertion that the announcement discussed a controversial issue of public importance subject to the Fairness Doctrine. The stations stated that "We will consider the question further should you submit some amplification of your request or description of the contrasting viewpoint you allege to be required." A third station stated that it had covered the issue of children's television programming on various occasions, including one within the past month on which the producer of "Sesame Street," a representative of "Let's Make a Wish" and the author of "Television's Children" had participated. The only other station whose response ACT forwarded to the Commission expressed willingness to broadcast ACT's viewpoint but objected to the first two paragraphs of ACT's proposed announcement, stating that "On this particular television station, we do not run 'twice as many commercials [on children's programs] as on adult prime time shows,'" and "we do not carry any 'repetitive violent cartoons.'" You state that modifying the ACT script (a copy of which is attached hereto) would be "interfering with the editorial freedom of our response."

4. ACT has forwarded a copy of the January 1972 issue of the TIO newsletter which contains the following language:

> TIO's "Children's Spot" has proved so effective on the air that some of television's most stubborn critics are trying to invoke the Fairness Doctrine so that they can get free time to mount further attacks . . . but station managers need not be intimidated by vocal critics demanding time for a reply * * * In our view, the spot—to the extent that it is controversial at all—is a modest and sensible rebuttal to any of the unbalanced criticism that has already been aired by most television stations.

5. ACT requests that the Commission take action on this matter "in light of the clear contravention of the [U.S. Circuit Court of Appeals] ruling by at least four of the stations we contacted," and it urges

> (i) that the Commission "declare that all stations that carried the TIO spot should make time available to represent the other side of the issue in similar fashion," and
>
> (ii) that "any licensee which claims it has adequately balanced the TIO spot should be requested to advise the FCC and ACT of the programming it deems to have presented the opposing viewpoint adequately."

The complaint here essentially seeks to invoke the fairness doctrine on the ground that the TIO announcement dealt implicitly with a controversial issue as contrasted to any explicit reference. The matter of implicit advocacy is one of those now being considered in the Commission's Fairness Inquiry in Docket No. 19260. We need not consider further the ACT complaint as to this matter, however, because we find that it is defective on procedural grounds.

A licensee who presents one side of a controversial issue of public importance must afford reasonable opportunity for the presentation of contrasting viewpoints. This requirement, embodied in the fairness doctrine, places the responsibility upon the licensee to determine whether a controversial issue of public importance has been presented and, if so, how best to present contrasting views on the issue. The choice of program format and spokesmen for presentation of contrasting views is within the licensee's discretion. The Commission will review complaints only to determine whether the licensee can be said to have acted reasonably and in good faith.

In its Public Notice of July 1, 1964, "Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance," the Commission stated that a complainant is expected to submit specific information indicating, *inter alia*, "the date and time when the program was carried" discussing a controversial issue, "the basis for the claim that the station has presented only one side of the question" and "whether the station has afforded, or has plans to afford, an opportunity for the presentation of contrasting viewpoints."

Here the complainant has not made the required showing. Of the four station responses forwarded by ACT, one stated that the issue of children's programming had been covered on various occasions, one expressed willingness to broadcast ACT's viewpoint but asked modification of the language of the proposed announcement on the ground that certain statements therein were inapplicable to the particular station, and two stated they did not understand ACT's assertion that the TIO announcement discussed a controversial issue under the Fairness Doctrine but added that they would consider the question further should ACT "submit some amplification of your request or description of the contrasting viewpoint you allege to be required." We cannot find that the four responses submitted to us by ACT are "unreasonable."

Furthermore, with respect to the other 129 stations, ACT has made no showing "whether the station has afforded, or has plans to afford, an opportunity for the presentation of contrasting viewpoints," or even as to which stations broadcast the TIO announcement, except for the 21 which stated they had not aired it and the other seven which stated that they had broadcast it. We note that ACT did not forward the responses of the latter seven stations.

Assuming, *arguendo*, that the TIO announcements constituted advocacy of one side of a controversial issue of public importance within the meaning of the fairness doctrine, the mere fact that the announcement was sent to a station, or even that a station broadcast it, is insufficient indication that the licensee has failed to comply with the requirements of the fairness doctrine respecting that issue. Nor, in our opinion, does the receipt of the announcement, in and of itself, obligate

each licensee to demonstrate to the complainant and the Commission that it has complied with the fairness doctrine with respect to the issue.

We also note that although the complaint was purportedly based upon the fairness doctrine, ACT seems in some passages to be asserting an entirely different claim; namely, its right of access for its spot announcements, based upon the Court's decision in the *BEM* case, *supra*, and regardless of fairness considerations. Complainant seems to have an erroneous impression of the decision in that case. There an organization sought to buy time for spot announcements expressing its views on the Vietnam war. There was no evidence that the licensee had failed to comply with the requirements of the fairness doctrine regarding the War. The sole question was whether a licensee might adopt a policy flatly banning the sale of time for presentation of all controversial issues.

The Commission ruled that such a policy was within the licensee's discretion. The U.S. Court of Appeals for the District of Columbia Circuit reversed the Commission's ruling. The Circuit Court's decision is now on appeal to the U. S. Supreme Court, which has stayed the mandate of the lower court. Pending release of the Supreme Court's decision, the Commission's original policy determination remains in effect under the stay of mandate. Although some aspects of the questions raised in *BEM* are being considered by the Commission in its Fairness Inquiry, the Commission has made it clear that it intends to withhold any further declarations on the First Amendment aspect of the question until the Supreme Court rules on the *BEM* appeal.

For the reasons set forth above, the requests of the complainant ARE DENIED.

Commissioner Johnson concurring and issuing the attached statement.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

From Television Information Office of the National Association of Broadcasters, New York

DO CHILDREN LEARN FROM TELEVISION?

(60 Seconds—Color AV-28)

AUDIO	
ANNC'R:	Do children learn from television?
1st GIRL:	I learned how to cook hamburgers.
1st BOY:	I learned about meteorite storms.
2nd BOY:	I learned about waterfalls, that the fish fall down and try to get back up.
3rd BOY:	You learn what's been happening in Texas with the drought or about the budget in New York City and other things.
4th BOY:	I saw a commercial about it and they said 285 kids died from drugs.
2nd GIRL:	I see shows on television about hospitals and I want to be a nurse when I grow up.
3rd GIRL:	You learn about pollution and what they're doing about it.
5th BOY:	On television you learn about other people's customs.

1st GIRL: I learned about three specific things I'm never going to take—alcoholism, smoking and bad drugs.

ANNC'R: Do children learn from television? What do you think?

August 1971

Because this, like previous TIO spots, has been produced on your behalf, it is not necessary to identify TIO on the air. A letter from the NAB Legal Department to this effect has been distributed to stations.

ACTION FOR CHILDREN'S TELEVISION—DECEMBER 1971

SCRIPT (TO BE READ WITH 3 SLIDES) TIME: 30 seconds

PUBLIC SERVICE ANNOUNCEMENT

(Response to announcement from Television Information Office on Children's TV aired earlier)

	Announcer:
Slide A: Children watching TV.	"Did you know that on children's television there are twice as many commercials as on adult prime-time shows?"
Slide B: Shot of girl's face.	"Children spend more time in front of a television set than in any other activity besides sleep. And most of their programs are repetitive violent cartoons."
Slide C: Logo for ACT's address.	"If you'd like to learn more about how to get better children's TV on the air, write Action for Children's Television, 46 Austin Street, Newtonville, Mass. 02160. You *can* help."

CONCURRING STATEMENT OF COMMISSIONER NICHOLAS JOHNSON

The Commission today denies the complaint of Action for Children's Television concerning the actual or conjectured broadcast, over some or all of 133 television stations in the top 25 markets, of a one minute Television Information Office spot announcement that purported to answer the question "Do Children Learn From Television?" Since TIO is essentially a publicity organ of the broadcasters, the answer was not only in the affirmative, but contained, moreover, the clear implication that what children learn from television is healthy, benevolent and finger-lickin' good.

ACT claims the spot is taking one side of a controversial issue of public importance, and with that contention I most heartily agree.

But the fairness doctrine does *not* prohibit the *presentation* of spots like the TIO commercial—or any other. It *does* require that broadcasters permit all points of view regarding controversial issues like that involved in the TIO spot. Whether individual broadcasters have done so is the issue before us.

I am therefore concurring with the dismissal of the complaint on procedural grounds, because I do not believe ACT has provided sufficient information on any individual station's response to form a rational judgment as to whether a fairness doctrine violation has occurred.

If public interest and community groups are to use effectively the few powers they have gained before this Commission, it is important

that they observe a few procedural rules that have been established as much for their benefit as for ours. It is not enough for a group like ACT simply to allege the controversiality of an issue. As in any administrative or judicial proceeding, certain actions or omissions on the part of the broadcaster must also be alleged in order to give the Commission some jurisdiction over what are, after all, the First Amendment rights of the broadcaster. The Commission clearly has the Constitutional authority to regulate the programming of a licensee in matters concerning the fairness doctrine. *Red Lion Broadcasting Co., Inc.* v. *F.C.C.*, 395 U.S. 367 (1969). But if we are to do so cogently we must be presented with more facts than ACT has given us in this case. If ACT had not used such an overly-enthusiastic "shotgun" approach, but had concentrated instead on building a more detailed case against one or two stations, they could conceivably have established a valuable precedent before the Commission (or in the Courts), which could then have been wielded to gain some legal leverage on this issue against other broadcasters.

Although the Commission majority refused to reach the controversiality of the issue ACT is seeking to discuss, I think there can be no question but that the TIO spot presented one side of a controversial issue of public importance. There is little doubt as to the existence of the controversy that rages today over the effects of television, and especially commercial television, on the growth and development of our nation's children. The controversy is not necessarily over the question "Do children learn * * *" but over precisely *what* they learn—intellectually, emotionally and psychologically. One need only examine the extensive literature linking television to violence and other social problems to understand the concern of ACT and groups like it.[1]

The upbeat tone of the TIO spot, the enthusiasm of its examples and the various statements made by TIO in its newsletters urging the stations to carry the spot are all designed to underscore the benevolence of the one eyed monster. As this Commission has heard in the course of many hours of oral argument in a major docket devoted exclusively to children's television, however, that is no more than an industry viewpoint, widely and ferociously disputed by an ever-increasing number of concerned Americans—parents and professionals alike. This Commission could not afford to treat lightly a complaint such as this one, if only it allowed us the opportunity to scrutinize more carefully the record and response of the individual station.

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[1] See, *e.g.*, *Television and Growing Up: The Impact of Televised Violence, Television and Social Behavior*, and the *Surgeon General's Scientific Advisory Committee on Television and Social Behavior* from which they are derived; *Violence and the Media*, a staff report to the *National Commission on the Causes and Prevention of Violence; Television and Juvenile Delinquency*, Report of the Subcommittee to Investigate Juvenile Delinquency, 88th Congress, 2d Session.

F.C.C. 73-184

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by
APPALACHIAN RESEARCH AND DEFENSE FUND, INC.
For Review of Ruling Concerning Fairness Doctrine Re Mountaineer Sports Network

FEBRUARY 14, 1973.

JOHN L. BOETTNER, Jr., Esq.,
Appalachian Research and Defense Fund, Inc., 116-B Kanawha Blvd., E., Charleston, W. Va.

DEAR MR. BOETTNER: This is in reply to your application for review of the Broadcast Bureau's ruling of December 8, 1971, that Section 315—fairness doctrine obligations do not apply to the Mountaineer Sports Network (hereinafter referred to as MSN). The ruling concerned your contention that primary responsibility for satisfaction of the fairness doctrine regarding your complaint about the broadcast of commercial announcements on behalf of the West Virginia Coal Association [1] rests with MSN [2] as the actual broadcaster of the announcements in question rather than the individual licensees that carried the broadcast. The Broadcast Bureau ruled that in view of the very limited nature of the programming by MSN, it would not be appropriate to turn to the network for satisfaction of any fairness doctrine requirements which might be bound to flow from the broadcasts complained of; that the primary fairness requirement is upon the licensee who may have carried, or has plans to carry, particular programs relating to the issue different from those of other stations in the network; and that in the area of a network as narrowly specialized and seasonal as MSN, it seems preferable to focus upon the individual station's compliance with fairness to ensure that all licensees who broadcast a controversial issue of public importance comply with the fairness doctrine.

Your application for review first sets forth the following issue: whether a "network broadcaster" may be legally exempted from Section 315 obligations solely because its programming is of a limited nature.

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[1] The complaint alleged that the West Virginia Coal Association commercial advertisements broadcast by MSN raised and presented one side of controversial issues of public importance in West Virginia concerning coal mine health and safety, the environmental effects of coal mining and strip mining and the socio-economic effects of the coal mining industry.

[2] You state that the "Mountaineer Sports Network is an affiliation of over twenty West Virginia radio stations for the singular purpose of broadcasting the play-by-play activities of West Virginia football and basketball games," and is owned and operated by West Virginia University.

You state that the Bureau's position is objectionable on the basis of statutory interpretation of 47 U.S.C. 315 because the statutory sanctions are invoked against "broadcasters" per se, without limitation, and this is further reinforced by administrative action of the F.C.C. itself in *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 Fed. Reg. 10415 (1964), wherein the F.C.C. gave notice of the specific application of the fairness doctrine to "* * * any case in which broadcast facilities are used for the discussion of a controversial issue of public importance." You further state that the scope of fairness in both the above cited instances is said to include all broadcasters, without limitation; that the Bureau would now attempt to limit the scope of fairness to exclude "narrowly specialized and seasonal" broadcasters in view of the "limited nature of the programming"; that such a limitation is plainly contrary to the intent and letter of the Communications Act; that your interpretation of the statutory language is supported by substantive reasons in that the programming of any broadcaster is limited, frequencies in the radio spectrum are limited, and broadcast time within any given frequency is limited, and that any difference between broadcasters in the range of their programming is one of degree and not of kind. Your application for review alleges that the Bureau's rationale serves to set the stage for increased curtailment of the fairness doctrine's scope of application; that the national networks could take the whole of their programming and splinter it into specialized parts which would fall beyond the purview of fairness; that the party seeking fairness time must then deal separately with each affiliate licensee of the network; and that this places an unequal burden on the party because the network is available only to the advertiser, not to the party seeking fairness reply time. You contend that the rationale of *Letter to Blair Clark*, 11 F.C.C. 2d 511 (1968), covers the instant case and should not be distinguished therefrom.

The response of MSN to your application for review states that you fail to cite any authority for your position that the Commission has jurisdiction over an entity such as the network; that there is nothing in the Communications Act of 1934, as amended, which specifically grants such jurisdiction; and that the Commission has no obligation to make it procedurally convenient for the Fund by by-passing its licensees. The network contends that to apply the fairness doctrine to the limited network would involve an extension of the doctrine which is not warranted; that the Commission cannot reach networks directly or advertisers, producers, sponsors and others who in one capacity or another are associated with the presentation of radio or television programs; and that the rationale for this jurisdictional limitation lies in the fact that Section 3(h) of the Communications Act provides that a person engaged in radio broadcasting shall not be deemed a common carrier and, therefore, it is the responsibility of the licensee to select broadcast material which fulfills public interest.

MSN contends that you ignore the first portion of Section 315 of the Communications Act which talks in terms of the obligations of the "licensee," and that the incidental use of the word "broadcasters" later in Section 315 was clearly one of convenience; that nothing in

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Section 2 of the Act, which deals with jurisdiction and application of the Act's provisions, would warrant a conclusion that Section 315 is to be applied to "broadcasters" rather than licensees of the Commission; and that there is nothing in *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance* which warrants a conclusion that the fairness doctrine should be applied to non-licensees of the Commission. The network further contends that the Commission has consistently followed a policy of imposing upon the individual licensee the responsibility of complying with the fairness doctrine and there is nothing in Commission policy statements which indicates that it will or can extend the responsibility for enforcement of the doctrine to groups, associations, limited networks, and other non-licensed entities.

MSN states that *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367 (1969), merely set forth the obligations of the licensees with respect to the fairness doctrine and it does not even contain dicta as to whether non-licensees can be looked to for enforcement of the doctrine. The network further contends that your reliance on *Letter to Blair Clark* is misplaced because there the Commission pointed out that Section 315 obligations attach to individual station licensees and the reason it accepted the complaint against the network in that case was that the complaint was based on a network program and it noted that the networks involved were licensees of their owned and operated broadcast stations. MSN states that it did not create or develop the announcements being complained of and it is not the licensee of any broadcast station; that it is not necessary to determine whether the Commission would have taken the national network to task in *Blair Clark* if the national network had not been a licensee because MSN, unlike a national network, has no continuous series of programs and has the extremely limited function of arranging for the broadcasting of certain sports of West Virginia University at certain times of the year; that it could not fulfill fairness doctrine obligations because it does not have the means for presenting regularly scheduled news, discussion, or interview programs in order to guarantee a balanced presentation of controversial subjects; and that it does not have the power or authority to require the participating stations to adhere to the fairness doctrine requirements.

The network states that the instant case is similar to the factual situation in *Phillip H. Schott*, 29 F.C.C. 2d 35 (1971), where the Commission refused to apply the fairness doctrine to a broadcast pool consisting of five stations that carried a political speech, pointing out that the pool was not a licensee and adhering to its policy of imposing upon the individual licensee the responsibility of complying with the fairness doctrine.

In reply to the response of MSN, you contend that its argument that you fail to cite any authority for the Commission's jurisdiction over the network as a non-licensed entity ignores the holding in *Letter to Blair Clark* that although Section 315 obligations attach to individual station licensees, where a complaint is based on a network program and addressed to a network organization, the Commission has always accepted this approach as a basis for issuance of a ruling on the matter.

You state that the issue is not one of jurisdiction of the Commission, but the irrational distinction drawn between the network organization in *Letter to Blair Clark* and the network in the instant situation; that to exempt MSN from Section 315 obligations because of the limited nature of its programming is unlawful and unauthorized since the Commission is without authority to grant such exemptions, even to networks of a limited nature; that there is no dispute that MSN is a broadcaster within the meaning of Section 315; that the network produces its own program, announcements and commercials which are carried over the entire network; that the affiliate stations merely receive the network broadcasts and relay them to their area listeners; and that except for the opportunity of presenting local commericals, the affiliate stations have no control over MSN or its programming. You contend that although the network is not a licensee of the Commission, the fact that it is not licensed is not to be construed as a grant of immunity from the fairness doctrine and that once the network, as a broadcaster, whether licensed by the Commission or not, begins to use its broadcast facilities for the discussion of controversial issues of public importance, the fairness doctrine attaches.

You further state that the contention by MSN that it is unable or without authority to satisfy any Section 315 obligations is without merit because the network could easily fufill its obligation under the fairness doctrine by incorporating into its regular programming a series of spot announcements covering the opposing viewpoints; that *Phillip H. Schott* is distinguishable from the instant case because the *Schott* case only involved five stations whereas twenty-seven stations are affiliated with MSN; and that the *Schott* case apparently involved only one controversial speech, whereas the Coal Association has saturated the State of West Virginia with controversial commercials to which the fairness doctrine applies.

Your response of March 1, 1972, to the reply to MSN to your application for review stated, "The issue here is not one of the jurisdiction of the F.C.C. Rather, the basis of the Application for review is the irrational distinction drawn between the network organization in *Letter to Blair Clark* and the Mountaineer Sports Network in the instant situation." However, your prior letter of November 17, 1971, to the Commission stated that it remains the position of the complainants that the primary responsibility for satisfaction of the fairness doctrine rests with the MSN as the actual broadcaster of the West Virginia Coal Association advertisements, and you requested the Commission to assert jurisdiction over MSN. Thus, the Broadcast Bureau's ruling of December 8, 1971, was specifically addressed to your request that the Commission assert jurisdiction over MSN.

The Broadcast Bureau ruling of December 8, 1971, stated that the primary fairness requirement is upon the licensee, who may have carried, or has plans to carry, particular programs relating to the issue different from those of other stations in the network; that no particular program or program series is required to comply with the fairness doctrine; that it is the licensee's overall programming which is looked to; and that in the area of a network as narrowly specialized and seasonal as MSN, it seems preferable to focus upon the individual

station's compliance with fairness to ensure that all licensees who broadcast a controversial issue of public importance comply with the fairness doctrine.

As set forth above, in *Letter to Blair Clark* the Commission, in a footnote, stated, "Although Section 315 obligations attach to individual station licensees, where a complaint is based on a network program and addressed to a network organization, as here, the Commission has always accepted this approach as a basis for issuance of a ruling on the matter. Additionally, it may be noted that each of the networks involved herein are licensees of their 'owned and operated' broadcast stations." The Bureau's ruling of December 8, 1971, also noted that the instant situation involving MSN differs from *Blair Clark* because there the networks involved broadcast a full range of programming, including programs dealing with controversial issues. Your application for review contends that the rationale of *Blair Clark* covers the instant case and should not be distinguished therefrom. However, the distinctions you point out concerning the number of stations, etc., do not bring the instant case within the above quoted rationale involved in *Blair Clark*, and we believe that the policy enunciated in *Phillip Scott* may appropriately be applied here, since the programming of the Mountaineer Sports Network is narrowly specialized and seasonal, and MSN is not a network in the sense in which that term was used in *Blair Clark*, in that it presents only occasional feeds of sports events and does not broadcast a regular schedule of programs, such as news, discussion, debate or commentary programs.

On the basis of the above, your application for review IS DENIED.

Commissioners Burch, Chairman; and Johnson concurring in the result; Commissioner Reid absent.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

F.C.C. 73-167

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 15.309 OF THE COMMISSION'S RULES PERTAINING TO EMISSION LIMITATIONS FOR CERTAIN FIELD DISTURBANCE SENSORS	Docket No. 19685 RM-2000

NOTICE OF PROPOSED RULEMAKING

(Adopted February 14, 1973; Released February 20, 1973)

BY THE COMMISSION: COMMISSIONER REID ABSENT.

1. Notice is hereby given of proposed rulemaking in the above entitled matter.

2. The Commission has received a Petition for Rulemaking[1] from the Emergency Products Corporation, 60 Lafayette Street, Newark, New Jersey, requesting modification of the emission limitations for field disturbance sensors, a type of restricted radiation device regulated by Part 15, Subpart F, of our Rules. These devices provide an alarm or signal when an object perturbs an electromagnetic field, generated by the device, due to the relative motion or presence of such an object. Operation of field disturbance sensors is permitted on all frequencies provided that the field strength of any emissions emanating from the device shall not exceed 15 microvolts per meter at a distance of $\lambda/2\pi$ meters (equal, when measured in feet, to 157 divided by the frequency in MHz). Additionally, operation on certain frequencies is permitted at an increased value of field strength in accordance with the following schedule:

Frequency (in MHz):	*Field strength (at 100 feet)*
915	
2450	50,000 microvolts per meter.
5800	
10,525	250,000 microvolts per meter.
22,125	

However, our Rules require that the spurious emissions (including harmonics), of devices operating on the frequencies specified in the above schedule, be suppressed at least 50 dB below the level of the fundamental but not below 15 microvolts per meter at 100 feet.

3. The petitioner has simultaneously tendered a request for waiver of the Rules looking to the grant of certification for the Emergency Products Corporation Model MW-1[2] field disturbance sensor which

[1] RM-2000, Filed: June 6, 1972.
[2] Application for certification filed June 7, 1972.

does not comply with the spurious limits as presently specified in § 15.309 of our Rules.

4. The petition which the Commission received from the Emergency Products Corporation requests a modification of § 15.309(b) to permit a higher level of spurious radiation than is currently permitted for field disturbance sensors operating above 10 GHz. Comments on this petition were received from the Security Equipment Industry Association (SEIA) and the Central Station Industry Frequency Advisory Committee (SIFAC) supporting in part and opposing in part the Emergency Products Corporation Petition for Rule Making.

5. Emergency Products Corporation makes several arguments in support of its request for a relaxation of the field strength requirements for harmonics. It points out that the majority of these devices are used within a closed structure and the attenuation of conventional walls at these frequencies is so large that there exists an extremely low probability that interference will be caused to other radio services operating outside the structure. The Petitioner argues further that there is no economically practicable means of complying with the above technical standard and that a filter to achieve the required level of suppression would cost approximately $325, which is far more than the total anticipated selling price of the Petitioner's sensor. Petitioner alleges that certain sensors certificated by the Commission do not comply with the present requirements. The Petitioner bases this allegation on measurement data provided by the General Electric Company.[3] Emergency Products Corporation requests that, for sensors designed to operate at 10,525 and 22,125 MHz, the suppression of spurious emissions excluding harmonics be left unchanged at 50 dB below the field strength of the fundamental. However, for harmonics of the fundamental, E. P. C. requests that the suppression requirement be changed to permit a power level of 50 uW (measured at the antenna terminals of the sensor).

6. The comments received from the Security Equipment Industry Association (SEIA) supports the Emergency Products Corporation contention that implementing the present regulations is not economically practical and states that the measurements required to demonstrate compliance with our rules are extremely difficult to make requiring extremely elaborate and expensive test equipment. SEIA also states that the probability of interference from these sensors is low due to the attenuation characteristics of buildings and walls at these frequencies and because highly directive antennas are typically used. SEIA recommends that spurious and harmonics be suppressed 30 dB below the level of the fundamental except that suppression below a level of 10 uW not be required.

7. The Central Station Industry Frequency Advisory Committee submitted comments which support the position taken by SEIA concerning the level of spurious emissions and the 10 uW level below which suppression of spurious signals would not be required.

[3] This data was obtained in the course of the development of a bulk-effect diode oscillator for the MW–1 field disturbance sensor, during which development the General Electric Company had occasion to evaluate a number of such devices.

COMMISSION PROPOSAL

8. The Commission recognizes the need for security devices of this type, especially in areas experiencing a high crime rate. We anticipate that as the public recognizes the protection that this type of device affords, the number of units in operation and the potential for interference will increase. Consequently, we are reluctant at this time to permit spurious radiation at harmonic frequencies to be increased to the extent requested by Emergency Products Corporation. Further, a review of Commission records indicates that, while no applications for certification of devices operating at 22,125 MHz were received, a number of manufacturers have satisfactorily performed measurements and met the spurious limits required (§ 15.309) for purposes of certification at 10,525 MHz.

9. We are not persuaded by the arguments presented by the petitioner and other respondents to establish the spurious limit in terms of power at the antenna terminals of the device. The spurious signal level at the antenna, in most cases, is modified by the directional characteristics of the antenna and other factors. The use of field strength is considered a better measure of the interference potential of emissions. The Commission proposes to continue to regulate spurious emissions of devices that operate under Part 15 by specifying limitations in terms of field strength.

10. The Commission has carefully considered the recommendation put forth in the Emergency Products Corporation's Petition, comments received concerning this petition, certification data on file and applicable information contained in an earlier proceeding concerning field disturbance sensors.[4] It also is recognized that electromagnetic energy at these frequencies (above 10 GHz) is rapidly attenuated by most materials, is readily used with directive antennas and exhibits line of sight transmission characteristics.

11. In view of these considerations, we proposed to amend Part 15 of the Rules to modify § 15.309(b) and add a new paragraph (c) as follows:

§ 15.309 Emission limitations.

* * * * * * *

(b) Spurious emissions from sensors operating in bands centered on 915, 2,450 and 5,800 MHz, including emissions on harmonics shall be suppressed at least 50 dB below the level of the fundamental; however, suppression below 15 microvolts per meter at 100 feet is not required.

(c) Spurious emissions from sensors operating in bands centered on 10,525 and 22,125 MHz, including emissions on harmonics, shall be suppressed at least 40 dB below the level of the fundamental; however, suppression below 2,500 microvolts per meter at 100 feet is not required.

NOTE: Measurement techniques may not be capable, at this time, of accurately measuring spurious emissions at the levels required by this rule.

[4] Report and Order, Docket 13863, adopted August 18, 1971; FCC 71-873, 31 FCC 2nd 210 (36 FR 16907, August 26, 1971).

Therefore, measurements of spurious emissions above 40 GHz to levels commensurate with the state of the art in measurement techniques are acceptable.

12. We are greatly concerned about the allegation made by Emergency Products Corporation and other sources concerning the matter of non-complying sensors. This aspect of the petition is not pertinent to the basic request made by Emergency Products Corporation and will not be considered in this proceeding, but will be investigated separately by the Commission.

EMERGENCY PRODUCTS CORPORATION'S REQUEST FOR WAIVER OF RULES

13. As indicated above, the Commission does not propose to permit field disturbance sensors to operate with spurious signals at the level specified by the petitioner. Under these circumstances, it is pointless to permit the sale and manufacture of devices which do not comply with our present rules or the revision proposed herein, and for which there is no prospect of compliance at a future date. The Commission cannot, therefore, find it in the public interest to grant the request of Emergency Products Corporation for waiver of our rules to grant certification for its non-complying MW–1 field disturbance sensor. The said request for waiver therefore IS DENIED.

14. Authority for the adoption of the Rules herein proposed is contained in Sections 4(i), 302, and 303(r) of the Communications Act of 1934, as amended.

15. Pursuant to applicable procedures set forth in Section 1.415 of the Commission's Rules, interested persons may file comments on or before March 28, 1973, and reply comments on or before April 6, 1973. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision on the Rules which are proposed herein, the Commission also may take into account other relevant information before it, in addition to specific comments invited by this Notice.

16. In accordance with the provisions of Section 1.419 of the Commission's Rules, an original and 14 copies of all statements, briefs, or comments shall be furnished to the Commission. Responses will be available for public inspection during regular business hours in the Commission's Broadcast and Docket Reference Room at its Headquarters in Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73–177

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.202, TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS (JESUP, GA.; ORLEANS, MASS.; GLADEWATER AND KILGORE, TEX.; AND MIDLAND, MICH.)	Docket No. 19525 RM–1819, RM–1831 RM–1828, RM–1835

REPORT AND ORDER

(Adopted February 14, 1973; Released February 20, 1973)

BY THE COMMISSION: COMMISSIONER REID ABSENT.

1. The Commission has before it for consideration the four FM channel assignment proposals upon which Notice of Proposed Rule Making was released herein on June 19, 1972 (FCC 72–514, 37 Fed. Reg. 12406), in response to requests of petitioners. The channel assignments proposed are as follows:

RM–1819 Channel 252A to Jesup, Georgia
RM–1828 Channel 284 to Orleans, Massachusetts
RM–1831 Channel 240A to Gladewater, Texas
RM–1835 Channel 228A to Midland, Michigan.

The proposals are unrelated and will be discussed and dealt with seriatim below. Population figures are from the 1970 U.S. Census reports unless otherwise specified.

RM–1819, JESUP, GA.

2. Channel 252A is proposed for a second FM assignment to Jesup, Georgia (population, 9,091), seat of Wayne County (population, 17,858), by R. B. Forehand (petitioner). The existing Jesup FM assignment, Channel 288A, is occupied by Station WIFO–FM, whose licensee, Jesup Broadcasting Corporation, is also licensee of the only other aural broadcast outlet at Jesup, Station WLOP, a daytime-only standard broadcast station. The supporting comments received from the petitioner on the proposal advise that if the proposed assignment is made to Jesup, he will apply for it and, if authorized, promptly build and place a new station in operation. No opposing or other comments on the proposal were received.

3. Channel 252A is technically feasible for a Jesup assignment since it can be assigned in full conformance with the minimum mileage separation requirements of the rules without requiring any other changes in FM assignments. The proposed assignment is also not objectionable because of its preclusionary effect upon new assignments elsewhere since such assignments would be foreclosed only on Channel

252A and in only an area in Georgia where there are three communities, one of which (Brunswick, population, 19,585), while larger than Jesup, already has two Class C FM assignments, and the other two (Darien, population, 1,826; and Ludowici, population, 1,419) are both small and, being no more than 15 miles from Jesup, could be served by a Jesup Channel 252A station. In fact, the petitioner stressed in his showing that an added advantage of his proposal is that a Channel 252A outlet at Jesup would not only serve Jesup and Wayne County but also Ludowici, the seat of Long County (population 3,745), as well as over half of Long County, which is presently without a local broadcast outlet or assignment.

4. It also appears from the information furnished by the petitioner, which has already been adequately discussed in the notice issued on his proposal, that Jesup is the cultural and economic center for Wayne County's activities; that his survey indicates public interest for a second local FM outlet at Jesup; and that this area has unsatisfied religious and other broadcast programming needs which an additional local aural outlet could satisfy or alleviate. His showing also indicates that conditions are favorable for a second FM outlet at Jesup from the standpoint of its growth trend in population, which has quadrupled since 1920, and its economy.

5. In view of the above, we believe that adoption of this unopposed FM channel proposal for Jesup is warranted and that the public interest will be served in thus enabling the public in the Jesup area to have additional local aural broadcast service from a second source.

RM–1828, ORLEANS, MASS.

6. The petitioner, Seashore Broadcasting Co., Inc. (Seashore), proposes the assignment of Class B Channel 284 to Orleans, Massachusetts (population, 3,055), for a first FM assignment. This community is centrally located in what the petitioner describes as the lower (outer) Cape area, as opposed to the upper (inner) Cape area, of Cape Cod, all of which (lower and upper) constitutes Barnstable County (population, 96,656). Station WVLC, a daytime-only AM broadcast station, licensed to Seashore, is the only aural broadcast outlet in Orleans and the only such outlet in the lower Cape area of Cape Cod at present. Because of the nighttime protection requirements for Station WWVA (AM), Wheeling, West Virginia, Seashore states that its Orleans AM station can never be authorized to provide a full-time local broadcast service to the lower Cape area and that it seeks the proposed FM assignment in order to provide Orleans and this area with a first full-time and nighttime local broadcast service. Besides Station WVLC, Barnstable County also has one unlimited-time AM broadcast station and four Class B FM stations, as well as an available Class A FM assignment, all located in the upper Cape area.[1]

[1] These stations are WDCB(AM), West Yarmouth, and FM Stations WQRC, Barnstable; WCIB, Falmouth; WCOD, Hyannis; and WOCB–FM, West Yarmouth. The available FM assignment is Channel 240A, assigned to Falmouth, and formerly occupied by Station WUCV, the permit for which was cancelled and the call letters deleted on July 27, 1972. An application (BPH–8206), filed December 12, 1972, for the Falmouth Channel 240A assignment by Frances E. Doddario, is pending.

7. Seashore filed supporting comments and reply comments on its proposal in which it advises that it will apply immediately for the proposed assignment, if made, and will construct and operate on it, if authorized. Comments in opposition to the proposal were filed by Cape Cod Broadcasting Company, Inc. (Cape Cod Broadcasting), licensee of Station WQRC–FM (Channel 260), Barnstable, Massachusetts, which also opposed rule making on the Seashore proposal, and by Kotcom Broadcasting, Inc. (Kotcom), licensee of Station WCOD–FM (Channel 291), Hyannis, Massachusetts. Both opponents alternatively propose that, if Orleans is deemed to warrant an FM assignment, a Class A channel rather than the proposed Class B channel be assigned, with Cape Cod Broadcasting proposing Channel 280A for the Class A assignment.

8. Either Class B Channel 284 or Channel 280A can be assigned to Orleans in conformance with all minimum mileage separation requirements without requiring any other changes in channel assignments and without adverse preclusionary effect on future assignments on either channel or on the six pertinent adjacent channels to communities in the immediate area because these channels are already precluded from assignment by existing stations. Our preclusionary study and those of the parties also indicate that the most efficient possibilities for use of either channel is in the lower Cape area since, while much of the signal of a station on either FM channel in this area would be over water, even more of their signal would go out to sea in any other technically feasible location. They further indicate that the only likely possibilities for use of either channel is in the lower Cape area and that, if the channels are not used there, they may never be used at all. This being the case, we do not feel the opponents are on sound ground in arguing that an additional FM assignment should not be made to Cape Cod to provide a first local outlet in the lower Cape area because, with five FM channels assigned (all in the upper Cape area), Cape Cod already has its fair share of the available FM channels. This argument might well be a dispositive reason for denying an assignment proposal in a case where there is evidence of a competing demand or a present or developing future need for use of the requested assignment elsewhere. It is not, however, in our judgment, a justifiable public interest reason for denying a requested and technically feasible assignment which would otherwise be likely to remain unused, as appears to be the case here, if it would serve a need.

9. Seashore's showing, we believe, sufficiently demonstrates that the assignment of a first FM channel to the lower Cape area for a first full-time local aural outlet and locally-oriented FM service would serve a need, especially for a first local broadcast nighttime service to this area. The lower Cape area, like the rest of Cape Cod, has experienced considerable population growth and economic expansion in recent years and 1970 Census figures show that its residents number approximately one-third of those residing on Cape Cod, yet, unlike the upper Cape area, which has five FM assignments, four of which are occupied, it is without even one FM assignment or a full-time AM outlet which could be used to meet the special local needs and interests of the permanent residents and of visitors to the outer Cape Cod area.

Some of the needs of the lower Cape area for a full-time local broadcast outlet were detailed in Seashore's showing and discussed in the notice issued on its proposal. They include a need for a forum for public discussion of local problems; a facility to provide news, information on matters vital to the public, weather advice, traffic notices, and advertising by and information for the benefit of commercial interests and recreational activities, and coverage of local sports in the evening; and a means for the different and widely-separated communities on the lower Cape to communicate with each other about their manifold interdependent problems. While the opponents contend that the FM stations in the upper Cape area are centrally located on Cape Cod and are oriented and programmed to Cape Cod, and not to the mainland, as Seashore claims, and that they as well as two Plymouth, Massachusetts, FM stations, provide ample service to the lower Cape area, they do not allege or show that any of these stations are primarily oriented to serving the local needs of the lower Cape area, as a local FM outlet in that area could do. Unquestionably, we believe, the public in the lower Cape Cod area would benefit from having a first full-time local broadcast outlet and service, notwithstanding the other aural services available in the area from stations in upper Cape Cod and other areas.

10. Kotcom also expresses concern that the assignment of another FM channel to Cape Cod will cause economic hardships to existing stations on Cape Cod, possibly resulting in the demise of one or more of them, but makes no showing which would permit evaluation of the basis for this concern. As we pointed out in the Notice, in discussing a like assertion of Cape Cod Broadcasting, the economic impact question is normally and more appropriately considered in passing upon a specific application for use of a new assignment rather than in rule making proceedings, and this appears particularly appropriate in this case since the Cape Cod area is rapidly expanding and any information concerning the economics of broadcasting on Cape Cod at the time this rule making proceeding is in process will quickly become invalid and inappropriate. In any case, the assertions of the opponents are clearly insufficient to permit a determination as to whether the alleged adverse economic effect of another FM station in the lower Cape area of Cape Cod is likely to cause diminution or destruction of overall program service to the public. In the absence of such a showing, we would not deny an application for a new station or an assignment proposal on economic impact grounds, since, as we have stated before, it is not our function to place artificial restraints upon competition unless the overall public interest would be adversely affected thereby.

11. Since we are satisfied that an FM assignment would have public benefit and serve a demand and need for local service in the lower Cape area and that either Channel 284 or Channel 280A would be technically feasible for such an assignment, we think one should be provided. Cape Cod Broadcasting, however, questions why Orleans should be preferred for the assignment when there are three other communities in the lower Cape area, all larger than Orleans—

Chatham, with a population of 4,554; Dennis, with a population of 6,454, and Harwich, with a population of 5,892—where Channel 284 (and also Channel 280A) would also be technically feasible for assignment and use. It, however, furnishes no evidence to indicate any demand or interest in establishing an FM station in any of those communities. On the other hand, based on the indicated interest and intent of Seashore in this record, there does appear every likelihood that an Orleans FM assignment would be applied for and used, if authorization is obtained. The record also provides no basis for assuming that Orleans would not be a desirable community for originating a full-time aural broadcast service to the lower Cape area since it is centrally located therein and alleged by Seashore to be the commercial hub and the principal shopping center for the outer Cape area. It also appears that since the communities of Chatham, Dennis and Harwich are within 15 miles of Orleans, the assignment of Channel 284 to Orleans would not preclude use of the channel for a local outlet in any one of them instead of Orleans.[2] A Channel 280A assignment to Orleans would also be available for application and use to Chatham or Harwich instead since they are no more than 10 miles from Orleans.[2] We therefore, think that, on balance, there is sound basis for making an assignment to Orleans. For reasons mentioned below, we believe the channel assigned should be 284.

12. The opponents feel that, if an FM channel is to be assigned to Orleans, there is no justification for providing a wide coverage Class B assignment, such as requested Channel 284, since a Class A assignment, such as Channel 280A, alternatively proposed by Cape Cod Broadcasting, would have the least impact on other assignments, can be assigned and is customarily assigned to smaller cities, such as Orleans, absent technical or service to unserved area considerations. We think that justification does exist for preferring Channel 284 over Channel 280A for the assignment since it could provide a second FM service to the Truro area of the lower Cape region, which now receives FM service only from Cape Cod Broadcasting's FM station at Barnstable (WQRC–FM), whereas an Orleans Channel 280A assignment would not. In addition, in light of the technical considerations discussed in paragraph 8, and the availability of an Orleans Channel 284 assignment for application and use in the larger communities of Chatham, Dennis, or Harwich (whereas Channel 280A at Orleans could only be used in Chatham or Harwich), there appears no valid reason for not making use of this Class B channel at this time.

RM–1831, GLADEWATER, TEX.

13. The petitioner, Orman L. Kimbrough, proposes the assignment of Channel 240A to Gladewater, Texas (population, 5,575), for a first FM assignment by reassigning Channel 240A from Kilgore, Texas (population, 9,494), where it has been assigned but never occupied since 1964, to Gladewater. No replacement for the Kilgore Channel 240A assignment, the only FM channel there assigned, was proposed.

[2] See § 73.203(b) of the Commission's Rules.

Brief supporting comments were filed by the petitioner which incorporate his prior petition on the proposal and reaffirm that he intends to apply for use of the proposed Gladewater assignment if it is made. Comments opposing the proposal were filed by Floyd W. Addington and Thomas H. Spurlock, d/b/as Kilgore Broadcasting Company (Kilgore Broadcasting), which inform that they plan to apply for use of Channel 240A at Kilgore in the very near future. Subsequently, on August 23, 1972 (Public Notice No. 87950), Kilgore Broadcasting tendered for filing an application for the Kilgore Channel 240 assignment.

14. Gladewater and Kilgore are located in the northeastern part of Texas on the boundary of Gregg County (population 75,929) and are both largely contained within that county, with Gladewater located about 11 miles north of Kilgore. While both communities are without a local FM outlet, each has a local AM radio station. Gladewater has Station KEES, a daytime-only operation, licensed to the petitioner, who seeks the proposed FM assignment there in order to provide Gladewater with a first local nighttime aural service also. Kilgore has Station KOCA, an unlimited-time operation, licensed to Radio Kilgore. There are also two other AM broadcast stations in Gregg County, Station KFRO, a daytime-only operation, and Station KLUE, both at Longview. The only FM station in the county, Station KHER (Channel 289), is also at Longview.

15. The opponents contend that the petitioner's case for moving Channel 240A from Kilgore to Gladewater rests solely on the fact that Channel 240A has been "lying fallow" while assigned to Kilgore; that he has offered no showing as to the entitlement of Gladewater over Kilgore to the channel for a first assignment; and that there is no justifiable reason now for moving Channel 240A from Kilgore to Gladewater since Kilgore is the larger community and their tendered application evidences that there is now demand for use of the channel at Kilgore by a serious applicant and prospect for Kilgore to have a first local FM service and a choice of two full-time aural services from different sources. They urge that the petitioner's proposal for use of the channel at Gladewater, where he operates the only existing local aural outlet, would make no contribution in terms of bringing in new competition and of providing for a healthy diversity in broadcast ownership and operations in the area.

16. While Kilgore would normally warrant a first FM assignment over Gladewater on the basis of size, we felt it in the public interest to consider the petitioner's unopposed reassignment proposal in rule making, considering that Channel 240A has been assigned to Kilgore since 1964 and there still appeared no evidence of any interest in using the channel for a local FM service there; that Kilgore has an unlimited-time local AM station, and that, by reassigning Channel 240A to the nearby community of Gladewater, where interest for use of the channel was evidenced by the petitioner's showing, it would be possible for Gladewater to have a first local FM outlet and a first local nighttime aural service and to provide Kilgore with FM service also. We now believe, however, in view of this record and the pending application for the Kilgore Channel 240A assignment which clearly demonstrate an interest and demand in using Channel 240A at Kilgore (where, in addi-

tion to meeting the need of that community for a first local FM service and a choice of full-time aural services, it can provide service to Gladewater as well) that, on balance, our assignment objectives and the public interest are best served by retaining the channel in the larger community of Kilgore at this time. Should it later appear, however, that there is undue delay in activating the channel at Kilgore because of lack of diligence in prosecuting an application for the channel or in building an authorized station, we would consider a further petition to move the channel to Gladewater to serve a need there, for it does not appear that another FM channel could be assigned there without foreclosing future development of educational FM facilities in this area.

RM–1835, MIDLAND, MICH.

17. Channel 228A is proposed for a second FM assignment to Midland, Michigan (population, 35,176), seat of Midland County (population, 63,769), by the petitioner, Wolverine Radio Company. The existing Midland FM assignment, Channel 259, is occupied by Station WSVC, licensed to Habco, Inc. Midland also has an unlimited-time AM broadcast station, Station WMPX, licensed to Patten Broadcasting Co., Inc. The supporting comments filed by Wolverine state that if the proposed assignment is made, it will promptly apply for its use to provide Midland with a second local FM service. No opposing or other comments on the proposal were received.

18. Midland is of a size to qualify for a second FM assignment under the usual criteria applied in such cases, even for a Class C assignment, since one is already assigned, and we believe it sound assignment policy to avoid the intermixture of classes of FM assignments in the same community. However, it does not appear that there are any unassigned Class C channels which would be technically feasible for assignment and use at Midland. Channel 228A, however, can be assigned and we believe, used effectively at Midland in conformance with all minimum mileage separation and other technical requirements of the Commission's rules without affecting any presently assigned channel. The preclusionary effect of the proposed assignment upon future assignments elsewhere would also be negligible since it would preclude new assignments only on Channel 228A in a limited area, and the six pertinent adjacent channels would not be affected. Further, the information furnished by the petitioner concerning the economy of Midland, the considerable number of industrial facilities and educational institutions there, its growth potential and the expanding cultural activities of the area in its prior showing, and discussed in some detail in the notice released on the proposal, provide reason for concluding that a second local FM service there would serve a need. For these reasons, we believe that this unopposed Channel 228A proposal for providing Midland with a second FM local service has public interest value and warrants adoption.

19. In view of the foregoing, and pursuant to the authority contained in Sections 4(i), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, IT IS ORDERED, That effective

March 28, 1973, the FM Table of Assignments, Section 73.202(b) of the Rules, IS AMENDED to read as follows for the cities listed below:

City:	*Channel No.*
Jesup, Ga	252A, 288A
Orleans, Mass	284
Midland, Mich	228A, 259

20. IT IS FURTHER ORDERED, That the request (RM–1831) of Orman L. Kimbrough to reassign Channel 240A from Kilgore to Gladewater, Texas, IS DENIED.

21. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-211

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.202(b), TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS. (STONE HARBOR-AVALON-CAPE MAY COURT HOUSE, N.J.)	Docket No. 19629 RM-1903

REPORT AND ORDER

(Adopted February 21, 1973; Released February 26, 1973)

BY THE COMMISSION:

1. The Commission here considers the Notice of Proposed Rule Making in this docket, adopted November 8, 1972 (37 Fed. Reg. 24368), proposing amendment of the FM Table of Assignments (Section 73.202(b) of the Commission's Rules) on the basis of the petition of Ronald L. Oberholtzer (Oberholtzer) who proposed assignment of Channel 232A to Stone Harbor-Avalon-Cape May Court House, New Jersey.

2. The issues more or less are those set forth in the Notice. We had raised the question whether a hyphenated assignment should be made to the three communities as proposed with a total population of 5,435, all located in Cape May County, population 59,554,[1] especially when the assignment of an FM channel to one of the communities would permit anybody to apply for use at either of the other two communities under the "10-mile" provision in Section 73.203(b) of the Commission's Rules. The petitioner pertinently noted that this proposal was a "drop-in" assignment in a seashore area in the southern part of the State of New Jersey. He relied on the fact that none of the communities had any means of local expression either in terms of a daily or weekly newspaper or broadcast facility and that the 1970 Census population did not properly reflect the population during the summer tourist season. The petition was opposed by Salt-Tee Radio, Inc. (Salt-Tee), the licensee of Station WSLT-FM, Channel 292A, Ocean City, New Jersey. Salt-Tee's opposition was based on economic injury grounds, which the petitioner took issue with in reply comments on the ground that such arguments were nominal and speculative. We noted that the petitioner's view more or less accorded with our view as to the meaning of *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940), as concerns FM channel rule makings. Filing comments and/or reply comments were the petitioner; Salt-Tee; Cape Christian Broadcasters, Inc., licensee of Station WRIO-FM, Channel 272A, Cape May, New Jersey (Cape Christian); and Jersey Cape Broadcasting Cor-

[1] All population figures are from the 1970 Census.

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poration, licensee of Station WCMC–FM, Channel 264, Wildwood, New Jersey (Jersey Cape). The latter three opposed the proposal.

3. Oberholtzer primarily relies on the contentions set forth in the petition for rule making which he incorporates by reference. As to the question of hyphenated assignment, however, Oberholtzer states that, while he intends to render primary service to all three communities, he now requests assignment of Channel 232A to Avalon, New Jersey, population 1,283.

4. Salt-Tee in its comments incorporates by reference its previous opposition to the petition. It makes an additional argument about a hyphenated assignment, but this has become moot. Salt-Tee also says that, if the Commission analyzes each community independently, it would determine that an assignment is not warranted.

5. The objections of Cape Christian are based on the proximity of Station WRIO–FM to the communities which Oberholtzer intends to serve, and its dependence on audience and revenues from those communities. Cape Christian also argues about the moot hyphenated assignment. Moreover, Cape Christian states that a prerequisite for assignment of a channel is a showing of a real need for service which is lacking here, since, in addition to Station WRIO–FM at Cape May, there are stations licensed or proposed for Ocean City-Somers Point, New Jersey (WSLT–AM/FM), and Wildwood, New Jersey (Stations WCMC AM/FM/TV), serving the area and, despite Oberholtzer's claim, there are newspapers serving the area. According to Cape Christian, these include the *Herald*, a weekly with offices in Cape May Court House; the *Seven-Mile Beach Reporter* (covering Stone Harbor, Cape May Court House, Avalon and Sea Isle City) with offices at Sea Isle City and North Wildwood; and two Philadelphia newspapers—the *Philadelphia Inquirer* and *Evening Bulletin*—have special sections for Cape May County. Cape Christian points out that Stations WSLT, WCMC, and WRIO–FM, especially the latter, serve the entire area. Strong reliance is placed on the Commission's decision adding Channel 260 to *Ocean City, Maryland*, in Docket No. 19316, 35 F.C.C. 2d 473, 474–5 (1972). Cape Christian also agrees with Salt-Tee's contention in opposition to the petition that there is no reason on the basis of the Commission's consideration of the adequacy of service of the area in the Second Report and Order in Docket No. 17495, as concerns the assignment of an FM channel to *Canton, New Jersey*, 11 R.R. 2d 1676 (1967), to assign another channel. In this respect, Cape Christian says that population and other factors have not changed in the interim.

6. Jersey Cape, in its comments opposing the proposal, urges that its Station WCMC–FM at Wildwood is approximately 10 miles south of the area petitioner wishes to serve and another station would have a severe impact on other radio broadcast stations in the area because of the sparse population except during tourist season. Jersey Cape maintains that a station in the Stone Harbor-Avalon-Cape May Court House area would deprive it of advertising revenue by drawing on that from Wildwood, the city of its assignment. It also states that the area is well served by existing stations and that another FM station in this sparsely populated area would have severe economic impact on all radio broadcast stations, the fact which Station WCMC–FM has

called to the Commission's attention in connection with license renewal in 1969 and 1972.

7. Oberholtzer filed reply comments and a supplement thereto. As concerns Salt-Tee's opposition, he indicates compliance with the Commission's *Policy to Govern Requests for Additional FM Assignments*, 9 R.R. 2d 1245 (1967), in making an appropriate preclusion study and showing that there is a demand for a station at Avalon. As to Cape Christian's opposition, the petitioner contends that service to the Stone Harbor-Avalon-Cape May Court House area from WCMC–AM and FM, and WRIO–FM is "marginal". Oberholtzer also disputes that these communities are adequately served by the four newspapers referred to by Cape Christian. With regard to the economic injury argument, specifically that portion of Cape Christian's contention that an additional FM station in the area would "fractionalize the base available to support those stations currently licensed to the area", Oberholtzer relies on that portion of the Report and Order in Docket No. 19491, adopted December 20, 1972 (FCC 72–1174; — F.C.C. 2d —), dealing with *Morro Bay, California*, to the effect that the Commission has a long-established policy of considering questions of possible undesirable economic competition only in connection with objections raised when a specific application has been filed. Oberholtzer points to the *Ocean City* case, 35 F.C.C. 2d 473, 474–5, as authority for the proposition that allocation of additional FM assignments might be made to a community not entitled to it under population criteria but because of needs during summer tourist season. Oberholtzer takes issue with Cape Christian's reliance on the *Canton, New Jersey*, case for the proposition that the Commission concluded that the area in question was adequately served; Oberholtzer states that not only is the case five years old but the Commission neither referred to the area in question specifically nor did the Commission conclude that the area was adequately served.

8. The *Morro Bay* case merely is a reiteration of our views expressed in the Notice for which we had cited the *Sanders* case. We also agree with petitioner's reading of the *Ocean City, Maryland*, and *Canton, New Jersey*, cases.

9. In view of the foregoing, we believe that the public interest, convenience, and necessity would be served by assigning Channel 232A to Avalon. In this respect, we reiterate the view expressed in Docket No. 19413 that FM channel assignments should not be denied if not able to be assigned elsewhere, 37 F.C.C. 2d 54, 55 (1972). Our decision is based on the facts and policies discussed, and the mandate of Section 307(b) of the Communications Act of 1934, as amended. Authority for the action taken herein is contained in Sections 4(i) and (j), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended. Accordingly, the FM Table of Assignments (Section 73.202(b) of the Rules), IS AMENDED, effective April 6, 1973, by adding the following:

City—Avalon, N.J.; channel No. 232A.

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

F.C.C. 72D-78

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of GENERAL BROADCASTING CO. (KOBO), YUBA CITY, CALIF. For a Construction Permit	Docket No. 19549 File No. BP-18880

APPEARANCES

Robert L. Heald, on behalf of General Broadcasting Company (KOBO); *Robert J. Rawson*, on behalf of Young Radio, Inc.; and *Henry L. Baumann*, on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE BASIL P. COOPER

(Issued December 14, 1972; effective February 5, 1973 pursuant to section 1.276 of the Commission's rules)

PRELIMINARY STATEMENT

1. In this proceeding, General Broadcasting Company, licensee of standard broadcast station KOBO, Yuba City, California, 1450 kHz, 250 watts, unlimited time, Class IV, seeks a permit to increase daytime operating power from 250 watts to 500 watts local sunset.

2. The Commission, by order adopted July 19, 1972, released July 27, 1972, found that except as indicated by the issues, the applicant was qualified to construct and operate station KOBO as proposed, and designated the above application for hearing specifying the following three issues:

> (1) To determine the areas and populations which may be expected to gain or lose primary service from the proposed operation of station KOBO and the availability of other primary (1 mv/m or greater in the case of FM) aural service to such areas and populations.
>
> (2) To determine whether the above proposal would cause objectionable interference to station KVON and, if so, the nature and extent thereof, the areas and populations affected thereby, and the availability of other primary service to such areas and populations.
>
> (3) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether a grant of the application would serve the public interest, convenience and necessity.

The Commission made Young Radio, Inc., licensee of station WVON, Napa, California, 1440 kHz (Class III), a party to the proceeding.

3. Prehearing conferences were held on October 10 and 31, 1972. The evidentiary hearing was held November 27, 1972. Proposed findings of fact and conclusions of law were filed by the applicant on November 30, 1972. No proposed or reply findings were filed by the Chief, Broadcast Bureau, or by Young Radio, Inc.

FINDINGS OF FACT

4. At the time the KOBO application was being prepared, the applicant's engineer, in predicting the distances to the proposed 0.5 mv/m daytime contour of station KOBO, relied in part on the soil conductivity as shown in Figure M3 of the Commission's rules which indicated a soil conductivity of 30 mv/m for approximately 40 miles south-southwest of station KOBO. On the assumption that the conductivities as shown by Figure M3 of the rules did prevail, it was calculated that with station KOBO operating with daytime power of 500 watts as proposed, there would be a slight, but prohibited, overlap of the proposed 0.5 mv/m daytime contour of station KOBO, 1450 kHz, Yuba City, California, and the existing 0.5 mv/m contour of adjacent channel, station KVON, Napa, California, 1440 kHz, Class III. The prohibited overlap being indicated, the application was designated for hearing on the issues as outlined above.

5. At the second prehearing conference, it was disclosed that Commission files contained measurements which appeared to establish that there would be no overlap of the proposed 0.5 mv/m daytime contour of station KOBO and the existing 0.5 mv/m contour of adjacent channel, station KVON. Additional time was granted within which the parties were to examine the measurements to ascertain if they had been taken properly, and if so, the conductivity shown by said measurements.

6. Commission files establish that on March 12, 1959, measurements were taken on the signal of station KOBO, formerly KAGR, along a radial path of 205° true, the direct radial from station KOBO toward station KVON. These measurements were contained in the files pertaining to station KEST, San Francisco, formerly station KSAN. On September 28, 1972, field intensity measurements on station KOBO radials in the directions 220°, 233° and 245° true were filed with the Commission in support of an application for minor changes in the antenna system of station KVRE, Santa Rosa, California.

7. The applicant's interpretation of the above measurements is that on the KOBO radial 205° true, the 0.5 mv/m contour of station KOBO operating, as proposed, with daytime power of 500 watts, will fall approximately two miles to the north-northeast, or short of the 0.5 mv/m contour of station KVON, Napa, California. On the other measured radials, the separation of the contours is shown to be substantially in excess of two miles. Using the measurements above identified to locate the 0.5 mv/m contour of station KOBO operating on the KOBO radials 205°, 220°, 233° and 245° true, and the soil conductivity as shown by Figure M3 of the Commission's rules to locate the 0.5 mv/m contour on KOBO radials 190° and 265° true, it is shown that with KOBO operating with daytime power of 500 watts, as proposed, the

0.5 mv/m contour of station KOBO will not overlap the existing 0.5 mv/m contour of station KVON, Napa, California.

8. The Broadcast Bureau, after studying the material referred to above, reached the same conclusions as the applicant's engineer—namely, that there will be no prohibited overlap of contours or no objectionable interference.

9. The president of Young Radio, Inc., licensee of station KVON, after studying the engineering data, advised all parties by letter dated November 17, 1972, that the licensee of station KVON was withdrawing objection to the grant of the KOBO application.

CONCLUSIONS

1. In this proceeding General Broadcasting Company, licensee of station KOBO, Yuba City, California, 1450 kHz 250 watts U, Class IV, seeks a permit to increase daytime power from 250 watts to 500 watts local sunset.

2. At the time the KOBO application was prepared and filed, the location of the pertinent service contours was based in part on the assumption that the soil conductivity between station KOBO and station KVON was as shown in Figure M3 of the Commission's rules. The use of the Figure M3 conductivity indicated that on the direct radial from station KOBO toward adjacent channel station KVON, there would be a slight overlap of the proposed 0.5 mv/m daytime contour of station KOBO and the existing contour of station KVON, Napa, California.

3. As shown in paragraph 6 of the basic findings, measurements had been made on the signal of station KOBO on March 12, 1959. These measurements were on the direct radial between station KOBO and station KVON. On September 28, 1972, measurements made on other KOBO radials were filed with the Commission. Measurements on all pertinent radials indicate that with station KOBO operating as proposed, the KOBO 0.5 mv/m daytime contour will not overlap the existing 0.5 mv/m contour of station KVON. The Broadcast Bureau agrees that station KOBO, operating as proposed, will not cause objectionable interference to station KVON, Napa, California. The licensee of station KVON has withdrawn its objection to the grant of the KOBO application.

4. The Commission, in its designation order, found General Broadcasting Corporation to be qualified to construct and operate station KOBO as proposed, but designated the application for hearing because of the indicated overlap of the 0.5 mv/m contours of stations KOBO and KVON. As shown above, the evidence of record established that the 0.5 mv/m daytime contour of station KOBO, operating with daytime power of 500 watts local sunset, will not overlap the 0.5 mv/m contour of station KVON, hence, will not cause objectionable interference to station KVON. Issue No. 2 is resolved in favor of the applicant.

5. The resolution of Issue No. 2 in favor of the applicant renders moot Issues 1 and 3.

6. The evidence of record, summarized in the foregoing findings of fact and conclusions, warrants the ultimate conclusion that the public interest, convenience and necessity will be served by granting the application of General Broadcasting Company.

IT IS ORDERED that unless an appeal to the Commission is taken by any of the parties or the Commission reviews this Initial Decision on its own motion in accordance with the provisions of Section 1.27c of the rules, the application of General Broadcasting Company for a permit to increase daytime power of standard broadcast station KOBO, Yuba City, California, from 250 watts unlimited time to 500 watts local sunset, unlimited time, BE and the same IS HEREBY GRANTED.

BASIL P. COOPER,
Administrative Law Judge,
Federal Communications Commission.

F.C.C. 73-166

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of GRENCO, INC., GREENWOOD, S.C. For Renewal of License of Stations WCRS and WCRS-FM, Greenwood, S.C.	Docket No. 19176 Files Nos. BR-1137, BRH-1674
and RADIO GREENWOOD, INC., GREENWOOD, S.C. For Renewal of License of Station WGSW, Greenwood, S.C.	Docket No. 19177 File No. BR-2821

APPEARANCES

Robert M. Booth, Jr., Esq. (Booth & Freret), for Grenco, Inc.; *Frank U. Fletcher*, Esq. and *Vincent J. Curtis*, Esq. (Fletcher, Heald Rowell, Kenehan & Hildreth), for Radio Greenwood, Inc.; *Lawrence J. Bernard, Jr.*, Esq., for United Community Enterprises, Inc.; *Michael T. Fitch*, Esq., for Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted February 14, 1973; Released February 23, 1973)

BY DEAN BURCH, CHAIRMAN, FOR THE COMMISSION: COMMISSIONER JOHNSON DISSENTING AND ISSUING A STATEMENT; COMMISSIONER REID ABSENT

1. This proceeding involves applications filed by Grenco Inc. for renewal of its licenses for radio stations WCRS and WCRS-FM, Greenwood, South Carolina, and by Radio Greenwood, Inc., for renewal of its license for radio station WGSW, Greenwood. The conduct with which we are here primarily concerned arose out of and in connection with applications for mutually exclusive facilities filed by United Community Enterprises, Inc. (United) for a standard broadcast station at Greenwood [1] and by Saluda Broadcasting Company, Inc. (SBC), for facilities at Saluda, South Carolina. In the consolidated proceeding in Docket Nos. 18503 and 18504 involving these applications an issue was designated to explore all the facts and circumstances surrounding the preparation and filing of the SBC application for the purpose of ascertaining whether the SBC application was in fact a strike application; i.e. whether its principal or incidental purpose was to delay or impede the establishment of a new standard broadcast facility in Greenwood.[2] Grenco and Radio Greenwood were made parties to

[1] In a decision adopted October 25, 1972, FCC 72R-308, the Review Board granted United's application.
[2] *United Community Enterprises, Inc., et al.*, 18 FCC 2d 555 (1969).

that proceeding because of their alleged support of the SBC application. Subsequently, before resolution of the strike issue, a petition filed by SBC requesting the dismissal of its application was granted. The dismissal left the strike issue unresolved and accordingly, in an Order, 28 FCC 2d 166, released March 25, 1971, we designated Grenco's and Radio Greenwood's renewal applications for hearing on issues to determine if either of the licensees had participated in or otherwise supported a strike application by SBC for the purpose of obstructing or impeding United's application.

2. In an Initial Decision, FCC 72D–19, released March 14, 1972, Chief Administrative Law Judge Arthur Gladstone absolved Grenco of any wrongdoing with respect to the strike application issue and granted its renewal applications. No exceptions have been taken to that aspect of his decision and it will be affirmed without further discussion in this decision. However, the Presiding Judge resolved the strike issue adversely to Radio Greenwood although he found no evidence of wrongdoing on the part of SBC or its principals. Rather, he concluded that Radio Greenwood had "embraced this application as a vehicle to launch an effort to block United * * * [and] that *he used the SBC transaction as his own strike vehicle, entirely independent of the actions or motivations of the SBC principals*" (emphasis as in original). He further found that George Cook, Radio Greenwood's 25 percent stockholder and general manager, "seriously and substantially perjured himself in respect to material matters testified to in this proceeding." Noting that a character issue against Cook had not been designated for hearing in this proceeding, the Presiding Judge urged that, as a matter of law, we adopt a policy that there is "an implicit character issue for consideration in respect to the truth and veracity of every witness who is a principal, or a person under the control of a principal, in a hearing case." The Judge denied Radio Greenwood's renewal application.

3. Exceptions to the Initial Decision and a supporting brief were filed by Radio Greenwood. The Broadcast Bureau filed a statement in support of the Initial Decision. Reply pleadings were filed by the Bureau, United, and Radio Greenwood. In a Memorandum Opinion and Order, FCC 72–939, we scheduled this proceeding for oral argument on the exceptions. Therein we also called attention to the Presiding Judge's finding of perjury and we directed the parties to include in their oral presentation a discussion of a number of questions raised by that finding.[3] The Commission heard oral argument in this case on January 3, 1973. The Judge's findings of fact will be adopted

[3] The parties were asked to address themselves to the following questions:
(a) Whether the evidence of record establishes that the principals of Radio Greenwood, Inc., or any of them, knowingly and willfully gave false testimony as to material matters at the hearing of this docketed proceeding.
(b) Whether the Commission is precluded as a matter of law from considering whether Radio Greenwood, Inc. possesses the requisite character qualifications to continue as a licensee of a broadcast facility unless a character issue is designated and a further evidentiary hearing is held with respect thereto; or, if not so precluded, whether a further evidentiary hearing would serve any useful purpose.
(c) Whether, on the basis of the evidence presently of record, Radio Greenwood, Inc. possesses the requisite character qualifications to continue as a Commission licensee.
(d) Whether, in view of all of the evidence of record, a grant of the application for renewal of license of Station WGSW filed by Radio Greenwood, Inc. would serve the public interest, convenience and necessity.

except as modified by our decision herein and our rulings on Radio Greenwood's exceptions.

4. Considering first the strike issue against Radio Greenwood, we conclude that the Presiding Judge erred in resolving this issue adversely to the renewal applicant. Our designation order explained that in order to be a "strike" application a principal or incidental motive of its filing "must be to obstruct or delay another application" and we specified as guidelines in making a determination the following: (1) the timing of the application, (2) the economic and competitive benefit occurring from the application, (3) the good faith of the applicant, and (4) questions concerning a frequency study. Since the SBC application was filed approximately 2 months after that of United and it would at least delay the commencement of a new competing facility in the Greenwood market, guidelines (1) and (2) were satisfied. However, as to guidelines (3) and (4), there is not only an absence of evidentiary support for a conclusion that the SBC proposal was a strike application, but the findings of fact adopted by the Presiding Judge preclude such a conclusion.

5. The undisputed evidence of record establishes that the initial steps looking to the establishment of a new standard broadcast station at Saluda were taken by James W. Warren, who was then employed at WGSW as Radio Greenwood's engineer, and Ted B. Wyndham, a Greenwood lawyer. In October, 1966, Cook, after consulting with communications counsel, advised Warren that he must either leave his employment at WGSW or withdraw from further participation in the Saluda proposal. Warren chose to withdraw from the Saluda application and one C. Bruce Barksdale was substituted. The Saluda application with Wyndham and Barksdale as principals was filed on November 16, 1966. With respect to motives and intentions of the participants in the Saluda proposal, the Presiding Judge affirmatively found that Warren and Wyndham had "conceived a bona fide intention and plan to establish a broadcast facility in Saluda in late 1965 or early 1966"; that no principal of SBC was motivated by a desire to block United's application; and that, in fact, the "inception and execution of that plan contemporaneously with the activities of United—was purely coincidental." Furthermore, the Judge found no significant evidence of record that either Cook or any other stockholder of Radio Greenwood had contributed money, services or time to the preparation or prosecution of the Saluda proposal.

6. In order to convert the bona fide application by the principals of SBC into a strike application by Radio Greenwood, the Presiding Judge asserted that our guidelines "are neither applicable nor pertinent * * * [because] *Cook publicly avowed that his interest in the application was in the context of a strike application*" (Emphasis as in original). This determination was predicated upon findings that Cook had evidenced a desire and intent to use the SBC application to his own advantage in order to impede United's application by: (a) seeking to enlist Dan Crosland, Grenco's manager, as an ally in an attempt to stop United; and (b) offering to reimburse Mullinax and Davenport for their expenses if they would withdraw the United application, and

threatening to obstruct United's application when the offer was refused. In further support of his conclusion that Cook had "embraced" the SBC application "as his own strike vehicle," the Presiding Judge took into consideration the continued employment of Warren as chief engineer at WGSW during the period that he was engaged in the preparation of the SBC application. Thus, considerable significance was attached to Cook's failure to present Warren with the alternative between his employment and SBC "earlier in the game, i.e. as soon as he became aware of the potential conflict between Saluda and United early in 1966." As previously noted, this ultimatum was not delivered to Warren until October, 1966, after the United application had been filed and Cook had been advised by communications counsel to do so. While recognizing that the SBC application might have been filed irrespective of when Cook spoke to Warren, the Judge considered that the failure to take earlier action detracted from the weight to be accorded Cook's claim of good faith and his denial of participation in a strike situation and, together with his "utterances concerning his motives and intent in respect to the Saluda applicant's activities, is sufficient to fix upon him the responsibility for encouraging and fostering what was, *for him*, a strike application" (emphasis as in the original).

7. The flaw in the logic of the Initial Decision is the failure to bridge the gap between mere desire and the *support* or *participation* in the *preparation* and *filing* of an *application* which are essential elements of a "strike" charge. Accepting the Judge's findings, there is no significant evidence of record that Cook or any other stockholder of Radio Greenwood committed any overt act which could be interpreted as support, encouragement, or participation in the SBC application or that any stockholder of Radio Greenwood contributed money, services or time to the preparation or prosecution of the SBC application which increased the likelihood of its success or served to delay the grant of United's application. With respect to Warren, who was an employee but not a stockholder of Radio Greenwood, the Judge found that he had a *bona fide* desire to own his own station and he expressly absolved him of any wrongdoing. In our view, even assuming that Cook had the desire to impede and obstruct the United application and welcomed the SBC filing, it cannot be held that Radio Greenwood—the principals of which filed *no* application—supported or otherwise participated in the preparation of a strike application absent a showing of some overt act in furtherance thereof or of the failure to perform some affirmative obligation which reasonably could be construed as supporting the strike application.

8. As for Cook's failure to require Warren either to resign or withdraw from the Saluda proposal at an earlier time, little if any decisional weight may be accorded to this finding of delay. While prudence may have dictated that Cook act more quickly—again accepting the Judge's finding that he became aware of the potential conflict between SBC and United early in 1966—we are not persuaded that Cook may be charged with having delayed in the performance of an affirmative obligation merely because he did not act sooner. Until United's application was filed there was no pending application with which the Saluda proposal would be in conflict, and Warren's associa-

tion with Radio Greenwood was a significant factor only because of this potential conflict. In the circumstances of this case where Warren was acting in good faith and the principals of Radio Greenwood committed no overt act in furtherance of the preparation or prosecution of the Saluda proposal, we are not prepared to hold that an adverse inference is warranted because Cook's discussion with Warren did not take place until after the actual filing of the United application. In this connection we also note that Cook had reason to believe Warren and Wyndham would not proceed with the SBC application after it appeared that a comparative hearing would be necessary because of the resultant financial strain. Of decisive significance, in our view, is the fact that when it became apparent that Warren and Wyndham intended to proceed with the application and immediately upon receiving advice from communications counsel that such action was advisable, Cook notified Warren that he must either resign his employment or withdraw from SBC. We conclude that Cook did not act unreasonably and that there is insufficient evidence of record to sustain a finding that Radio Greenwood supported or participated in the filing of a strike application.

9. Next we shall consider: (a) whether in the disposition of this case we may take into account any false swearing by Cook at the hearing in the absence of a character issue; and if we may, (b) whether the evidence of record is sufficient to support a conclusion that Cook, as a principal of Radio Greenwood, lacks the requisite character qualifications to continue as a licensee of the Commission.

10. On issue (a) above, the Courts and the Commission have consistently held that false statements in response to Commission inquiries and in the course of the hearing process are, in and of themselves, of substantial significance. See *Nick J. Chaconas*, 28 FCC 2d 231, 233 (1971). Complete candor from Commission licensees as to matters under investigation may be demanded and is expected. *FCC* v. *WOKO, Inc.*, 329 U.S. 223 (1946). While issues are designated to place the licensee on notice of the charges which he will be required to meet at the hearing, notice to a renewal applicant that he must testify truthfully and not conceal material information is superfluous. Taking an oath serves that purpose and no unfairness results in holding a renewal applicant to have knowingly assumed the risk of an adverse determination as to its character qualifications when a principal testifies falsely at the hearing.

11. As to issue (b), the matter is a most difficult and close one. If this were a tort trial, and it was necessary in order to resolve the issue of tort liability to decide between the testimony of Cook on the one hand and Mullinax, Davenport and Crosland on the other hand, we would agree with the conclusion of the Chief Administrative Law Judge to go with the latter testimony. But that is not the type of issue before us. Rather, it is whether we should find that Cook deliberately lied in his testimony to this agency and on that basis lacks the requisite character to be a licensee. What is involved, therefore, is the integrity of the Commission's processes—that it must be able to rely on candor and honest dealing from its licensees. *FCC* v. *WOKO, Inc.*, supra. But while we have no hesitancy in resolving the issue (unlike the conflict

issue in, say, *In Re Complaints Covering CBS Program "Hunger in America"*, 20 FCC 2d 143 (1969)), it behooves us, of course, to do so with full awareness of the drastic consequences of an adverse ruling. Taking into account that consideration and the nature of the record evidence here involved, including the difficulty of remembering fully conversations that occurred three to five years before the testimony, we are inclined not to find deliberate lying (perjury) by Cook. Rather we believe there occurred a faulty shading of recollection—an attempt to recall long past conversations where the consequences may have unconsciously influenced Cook's recollection in a manner favorable to himself.

12. We think that this effort—perhaps understandable human nature in the circumstances and reflecting adversely on Cook—cannot be said to be deliberate falsehood (or perjury), with the degree of certainty that we believe is reasonably called for with respect to a finding of this nature. We stress that our holding is based on the particular facts of this case, and does not represent in any way a retreat from the important policy of *WOKO* that we cannot temporize with deliberate deception of the Commission. No matter how unblemished the reputation of the principal in the community, no one is allowed "one bite" at the apple of deceit. We believe that by this time the message has been received by broadcast licensees that a station can get into greater and indeed the most difficulty by a course of deception or lack of candor when an issue is raised. See, e.g., *Continental Broadcasting, Inc.*, 15 FCC 2d 120 (1968), reconsideration denied 17 FCC 2d 485 (1969), affirmed 142 U.S. App. D.C. 70. 439 F 2d 580 (1971), cert. denied, 403 U.S. 905 (1971); *Palmetto Broadcasting Co.* (WDKD), 33 FCC 250 (1962), reconsideration denied 34 FCC 101 (1963), affirmed sub nom. *E. G. Robinson, Jr.* v. *FCC*, 118 U.S. App. D.C. 144, 334 F 2d 534 (1964), cert. denied 85 S. Ct. 84 (1964); *Brandywine—Main Line Radio, Inc.*, 24 FCC 2d 18, (1970) reconsideration denied 27 FCC 2d 565 (1971), affirmed U.S. App. D.C., Case No. 71-1181, September 25, 1972, rehearing denied December 4, 1972. In short, our judgment here is strictly a factual one—that while it is a close question, it is appropriate to hold back from the ultimate adverse finding on the particular record before us.

13. Accordingly, IT IS ORDERED, That the applications of Grenco, Inc. for renewal of its licenses for Stations WCRS and WCRS-FM, and of Radio Greenwood, Inc. for renewal of its license for Station WGSW, all at Greenwood, South Carolina, ARE GRANTED; and

14. IT IS FURTHER ORDERED, That the Motion to Correct Transcript, filed January 11, 1973, by Radio Greenwood, Inc. IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

Rulings on Exceptions of Radio Greenwood, Inc.

Exceptions to findings	*Rulings*
A1, A2, A3, A4, A5, A6, A7, A8, A9, A10, A12, A13, A15, A16, A18, A21.	Denied. The exceptions are not of decisional significance, particularly in light of our decision herein.
A11	Granted to the extent set forth in paragraph 8 of our decision as to Cook's obligation to require Warren to resign or withdraw from the SBC application. Denied in other respects as not decisionally significant.
A14	Denied. The exception is not of decisional significance. It is also a misstatement of law since it is not a prerequisite to a strike application that the applicant be financially qualified.
A17	Denied. Mullinax's denial was not under oath, did not adversely affect Cook, and was an attempt to maintain the confidentiality of a business decision. It has no bearing on Mullinax's veracity under oath in a hearing proceeding.
A19	Granted in part. See our conclusion herein, that Cook did not adopt SBC's application as a strike application. Denied insofar as Mullinax's notes are concerned as not decisionally significant.
A20	Denied. No basis exists for the requested action.

Exceptions to failure to make findings	*Rulings*
B1	Denied. While Mullinax and Davenport were aware of Cook's antagonism, a finding that they were "Conditioned to be suspicious" and that as a result any notes taken would be suspect, is speculative.
B2, B3, B7, B8, B9, B10, B11, B13, B14, B16, B17, B18, B19, B20, B21, B23, B25, B26, B27, B28, B29, B30, B32, B33, B34, B35, B36, B37, B38, B39, B40, B41, B42, B43, B44, B45, B46, B47, B48.	Denied. The requested findings are not of decisional significance, particularly in light of our decision herein.
B4	Denied. The requested finding is not warranted by the evidence of record nor is it of decisional significance.
B5, B6, B15	Denied. The instant record does not support the requested findings which are based on speculation.
B12	Granted to the extent that the instant record does not support the finding of the Judge that Cook perjured himself. Denied in other respects as not decisionally significant.
B22	Granted to the extent set forth in paragraphs 11 and 12 of our decision.
B24	Denied. It does not follow that because Mullinax attempted to get Crosland to agree with his version of what occurred, that Mullinax was less than candid in preparing his notes and his testimony.
B31	Granted. The proposed finding indicates that the differences in testimony might be attributed to differences in recollection.

Exceptions to conclusions	*Rulings*
C1, C4, C6, C7, C8, C9, C10, C11, C12, C13, C14(1),* C15, C17, C18, C19, C21, C23, C24, C25, C26, C28, C30, C32.	Denied. The exceptions are not of decisional significance.
C2	Denied. The conclusion is supported by the record.
C3	Granted. The record does not support a finding that Cook was involved in a strike application.
C5	Granted in part. Even if true, the conclusion does not show acts supporting a strike application. Otherwise, the exception is denied as not of decisional significance.
C14(2)*	Granted. The discrepancies in testimony can be attributed to differences in recollection.
C16	Denied. The exception is speculative and not supported by the evidence of record.
C20	Granted. The conclusion is speculative and not supported by the evidence of record.
C22, C37	Granted. Cook was acting upon his attorney's advice and under the circumstances of this case was not obliged to deliver to Warren the ultimatum before the filing of the applications became imminent.
C27, C29	Denied. The exceptions are not of decisional significance. As our decision holds, however, while Cook may have desired to capitalize on the SBC filing there is no evidence that he actively supported or aided the filing.
C31	Granted. Cook acted on advice of counsel, and no adverse conclusion should be drawn from his failure to offer Warren the ultimatum concerning his participation in SBC earlier.
C33	Granted. The Administrative Law Judge improperly departed from the criteria for strike applications. The differences in the testimony may be attributed to differences in recollection.
C34	Granted. The Judge relied on incorrect standards to deny Radio Greenwood's application.
C35, C36, C38, C40	Granted. The record does not support the conclusion that Cook actively supported the SBC application or embraced it as a strike vehicle.
C39	Granted. There is insufficient basis for a finding of perjury since the discrepancies in the testimony may be attributed to differences in recollection.
C41	Granted. The record evidence does not warrant a conclusion that the renewal of Radio Greenwood's license is inconsistent with the public interest.

Exceptions to rulings	*Rulings*
D1, D2, D3, D4, D5, D6, D7, D8, D9, D10, D11, D12, D13, D14, D15, D16, D17, D18, D19.	Denied. The exceptions are not of decisional significance.

*There are two exceptions numbered C14.

Dissenting Opinion of Commissioner Nicholas Johnson

Today, after a two-year fact-finding proceeding, the Federal Communications Commission dismisses the facts found by its Chief Administrative Law Judge and supported by its staff, and grants Radio

Greenwood, Inc.'s application to renew the license for WGSW, Greenwood, South Carolina. I dissent because the record clearly indicates that George Cook, one of Radio Greenwood's principal stockholders, misrepresented the facts to this Commission.

In March, 1971, we designated Radio Greenwood's license renewal application for hearing to determine whether Mr. Cook had participated in the filing of a strike application (application of Saluda Broadcasting Co. for facilities at Saluda, South Carolina)—an application designed solely for the purposes of impeding the establishment (by United Community Enterprises) of a new broadcast facility in Greenwood South Carolina. In his initial decision, the Chief Administrative Law Judge concluded that while Mr. Cook had not personally participated in the filing of the Saluda Broadcasting application, he had "embraced" that application and had, as a result, used it as a vehicle to try to block the establishment of a competing radio station in Greenwood. The Judge also found that Mr. Cook had lied during the hearing in an attempt to avoid an adverse determination with respect to the strike issue.

I agree with the majority that, as a matter of law, Mr. Cook's conduct with respect to the Saluda application does not inculpate Radio Greenwood in the filing of an unlawful strike application (see Majority opinion at 4–6). I also agree that while we did not designate the misrepresentation question for hearing—because the alleged misrepresentations by Cook did not take place until after the hearing had begun—that question is a proper one for consideration at this time. (See Majority opinion at 7.) However, I cannot agree with the majority's conclusion—reversing the Chief Administrative Law Judge—that the evidence is insufficient to support a finding of misrepresentation.

The Administrative Judge found that Mr. Cook had lied on two separate occasions during the hearing. First, Cook denied that he had approached Mr. Dan Crosland, general manager of Grenco, Inc., licensee of two other Greenwood radio stations, with the suggestion that both Cook and Crosland attempt to thwart United's pending Greenwood application. Mr. Crosland testified that Cook had made such a suggestion. When Cook, who recalled numerous historical details, including the date of the meeting, denied the substance of the conversation as related by Crosland, the Administrative Judge informed Cook that there was a distinct difference between "not recalling" a conversation and "denying" that it ever took place. Mr. Cook, nevertheless, denied the conversation, and the Judge—who, unlike the majority, had the opportunity to examine the witnesses' demeanor first-hand—believed Crosland. The majority nevertheless attributes this discrepancy in testimony to Cook's "shady recollection"—a conclusion which makes no sense on the present record.

The Judge next determined that Cook had lied when he denied the veracity of an affidavit filed by William Mullinax, a principal of United Community Enterprises. In that affidavit, and also during the hearing, Mullinax stated that Cook had approached both Mullinax and John Davenport (another United official) and had attempted to buy them off in order to thwart the United Application. Again, the Admin-

istrative Judge believed Mullinax, not Cook, and the majority, apparently realizing that there is no basis in the record for reversing this finding, again attributes Cook's false testimony to a "faulty shading of recollection."

There is simply no basis for such a conclusion. Either Cook was deliberately lying during the hearing, or we must conclude that both Mullinax and Crosland perjured themselves. The Administrative Judge chose the first conclusion, and there is nothing in the record to suggest that that decision is clearly—or even slightly—erroneous. Since none of the witnesses claimed they could not remember the facts, the majority's suggestion to the contrary finds support, not in the record, but, rather, in the majority's desperate desire to avoid imposing the penalty which inevitably follows from a finding of misrepresentation.

The majority recognizes—and, indeed, the law is crystal clear—that deception or lack of candor before this Commission is grounds for the denial of a license renewal application. *Nick J. Chaconas*, 28 FCC 2d 231, 233 (1971); *Brandywine-Main Line Radio, Inc.*, 24 FCC 2d 18, 28–32 (1970); *Continental Broadcasting Inc.*, 15 FCC 2d 120 (1968); *WMOZ, Inc.*, 36 FCC 202 (1964); *FCC* v. *WOKO, Inc.*, 329 U.S. 223 (1946). Our licensees have clear notice of this prohibition against deceit, and strict compliance is obviously crucial if we are to preserve the integrity of our process. *See, e.g., Nick J. Chaconas, supra.*

Students of the FCC have discovered that this Commission is loath to invoke the severe sanctions of license revocation or renewal denial for any reason *other* than misrepresentation. *See, e.g.*, Abel, Clift and Weiss, "Station License Revocation and Denials of Renewals (1934–1969)," 14 *Journal of Broadcasting*, 411 (1970). There the authors illustrate that in nearly every case where this Commission revoked a broadcast license or denied a renewal application, misrepresentation was a key issue. Students of the FCC are also aware that it is normally the small, poorly represented broadcaster—and not the large multiple owner—who suffers most severely under our approach to misrepresentation. *See, e.g., Trans America Broadcasting Corp.*, 33 FCC 2d 596 (1972), where the majority, after designating one of a large broadcaster's renewal applications for hearing on, *inter alia*, misrepresentation issues, fought mightily to avoid finding such misrepresentation. *See also* the Hearing Examiner's Initial Decision, 20 RR 2d 1095 at 1108–1109, where, in the face of heavy odds, the fact-finder struggled even harder to avoid the conclusion that the licensee had misrepresented itself to this Commission.

By today's decision, the majority illustrates that it will no longer engage in such unfair discrimination against the small station owner. In so doing, however, the majority also reveals that whether a station be big or small, misrepresentation by its licensee will not result in the denial of a renewal application.

When we come to the point where we are no longer willing to ensure that our licensees exhibit honesty in precedings before this Commission, then we are surely lost.

I dissent.

109-029—73——8

F.C.C. 72D–19

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of GRENCO, INC., GREENWOOD, S.C. For Renewal of License of Station WCRS and WCRS–FM, Greenwood, S.C. and RADIO GREENWOOD, INC., GREENWOOD, S.C. For Renewal of License of Station WGSW, Greenwood, S.C.	Docket No. 19176 File Nos. BR–1137 and BRH–1674 Docket No. 19177 File No. BR–2821

APPEARANCES

Robert M. Booth, Jr., Esq. (Booth & Freret), for Grenco, Inc.; *Frank U. Fletcher*, Esq. and *Vincent J. Curtis*, Esq. (Fletcher, Heald, Rowell, Kenehan & Hildreth), for Radio Greenwood, Inc.; *Lawrence J. Bernard, Jr.*, Esq. (Pierson, Ball & Dowd), for United Community Enterprises, Inc.; *John H. Midlen, Jr.*, Esq., for James W. Warren; *Walter C. Miller*, Esq., *Charles A. Zielinski*, Esq., and *Michael T. Fitch*, Esq., for Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF CHIEF HEARING EXAMINER ARTHUR A. GLADSTONE

(Issued March 8, 1972; Released March 14, 1972)

PRELIMINARY STATEMENT

1. By Memorandum Opinion and Order, 28 FCC 2d 166, 21 RR 2d 560 (released March 25, 1971), the Commission designated the above-captioned applications for hearing upon the following issues:

> 1. To determine whether Grenco, Inc., principals or agents and/or whether Radio Greenwood, Inc., principals or agents supported or otherwise participated in the preparation and filing of the application of Saluda Broadcasting Company, Inc. for a new radio station at Saluda, South Carolina on 1090 kHz, 500 watts power, daytime only (File No. BP–17529, Docket No. 18504) for the purpose of impeding or obstructing grant of the application of United Community Enterprises, Inc. for a new radio station at Greenwood, South Carolina on 1090 kHz, 1 kw power, daytime only (BP–17439, Docket No. 18503).
>
> 2. To determine whether in light of the evidence adduced under the foregoing issue, grant of the applications for renewal of

licenses of WCRS and WCRS–FM submitted by Grenco, Inc. and WGSW submitted by Radio Greenwood, Inc. would serve the public interest, convenience and necessity.

2. A prehearing conference was held on May 4, 1971, and the matter was heard in Greenwood, South Carolina, on August 10–12, 1971, and in Washington, D.C., on October 1, 1971, and November 12, 1971. The record was closed on November 12, 1971. Proposed findings of fact and conclusions of law, and replies thereto by all parties except Grenco, have been timely filed. United sought leave to file a supplemental pleading relative to the reply filed by Radio Greenwood. That motion was granted, and the supplemental pleading has been duly considered.[1]

FINDINGS OF FACT

3. This proceeding involves all the broadcast stations licensed to Greenwood, South Carolina: WCRS, 1450 kHz, 1000 watts day, 250 watts night, unlimited time, and WCRS–FM, 96.7 MHz, 1300 watts effective radiated power in both the horizontal and vertical planes, unlimited time, licensed to Grenco; and WGSW, 1350 kHz, 1000 watts daytime only, licensed to Radio Greenwood.

4. The basis for this proceeding arose out of the hearing in Docket Nos. 18503 and 18504, in which there were at issue mutually exclusive applications for new facilities for Greenwood and Saluda, South Carolina, respectively. United Community Enterprises, Inc. (United), the applicant for Greenwood,[2] successfully sought enlargement of issues in that proceeding to include a strike issue against Saluda Broadcasting Company, Inc. (SBC), the Saluda applicant. Grenco and Radio Greenwood were made parties to that proceeding because of their alleged involvement in supporting the SBC application as a strike application against United.[3] Subsequently, and before hearing on the strike issue was conducted, a petition by SBC to dismiss its application was granted. A subsequent motion, filed by Radio Greenwood, to enlarge the issues in the United-SBC case to permit resolution of the strike allegations against it, was denied.[4] These actions left unresolved allegations of participation in a strike application outstanding against Grenco and Radio Greenwood,[5] with no pending proceeding in which to resolve them. When the Grenco and Radio Greenwood renewal applications later came before the Commission, it designated them for hearing in this proceeding and made United a party hereto. (Designation Order, at paragraphs 2 and 3.)

[1] Motion for leave to file granted by Order of February 28, 1972.

[2] The application of United was denied in an Initial Decision in Docket No. 18503, FCC 71D–72 (released October 19, 1971) for reasons not germane to the issues in this proceeding. United filed its exceptions thereto on December 20, 1971. The matter is pending final decision.

[3] 18 FCC 2d 555 (Review Board 1969).

[4] *United Community Enterprises, Inc.*, 22 FCC 2d 556, 18 RR 2d 1040 (Review Board 1970).

[5] Grenco is wholly owned by Douglas Featherstone (Grenco Ex. 2). The ownership structure of Radio Greenwood is as follows: W. C. Woodall, Jr.—37½ percent, Mrs. O. C. Swindle—37½ percent, and George B. Cook, Jr.—25 percent (Tr. 170).

UNITED'S PETITION FOR ENLARGEMENT OF ISSUES IN DOCKETS NOS. 18503 AND 18504

5. United's Petition for Enlargement of Issues (Grenco Ex. 6), with the affidavits of Wallace A. Mullinax (B/B Ex. 6), John Y. Davenport, and Palmer A. Greer (United Ex. 9) attached thereto, was filed April 29, 1969.[6] Mullinax and Davenport are the principals of United, and Greer was United's consulting engineer.

6. In his affidavit Mullinax made certain significant allegations which are summarized as follows: He and Davenport went to Greenwood on September 12, 1966, to place a legal advertisement announcing the filing of United's application for Greenwood. While there, they visited Dan Crosland, manager of WCRS, to renew their acquaintance with him and, as a courtesy, to inform him of their application. Crosland said he was aware of preparation of an application for Greenwood, but he had not known by whom. He also said that George Cook, Jr., manager of WGSW, had earlier contacted him (Crosland) regarding the possibility of a third standard broadcast station coming into Greenwood. Crosland said that Cook was very upset about the possibility of additional competition in Greenwood and had suggested to Crosland that they cooperate to keep additional competition out of the community, and that they could do so by having a competing application filed for Saluda. Crosland said he had told Cook that WCRS would not participate in such activities. (B/B Ex. 6.)

7. Mullinax's affidavit further stated that, after leaving Crosland's office, Davenport and Mullinax went to WGSW to speak to Cook. Cook said he had known that an application was being filed. Cook inquired how much profit United expected to make in the first few years and said that he might be able to arrange payment equal to that profit if United would withdraw its application. Mullinax and Davenport responded that they wanted to serve Greenwood and that time and expenses had gone into preparation of their application. At that point, Cook offered to reimburse United for all those expenses and said the majority owner of WGSW, Mr. W. C. Woodall, Jr., wanted to fight United's application. (B/B Ex. 6.)

8. Mullinax stated that, after he and Davenport again told Cook they would not withdraw their application, Cook told them that 1090 kHz, the frequency for which United was applying, could be used in Saluda and he knew people in Greenwood who would apply for the frequency in Saluda. (B/B Ex. 6.)

9. Mullinax's affidavit further recited that, after the conversations with Cook and Crosland, he telephoned United's consulting engineer, Palmer A. Greer, and related the conversations to him. Later, on the same day (September 12), Greer's wife phoned Mullinax and said that Mullinax and Davenport should make notes concerning the conversations with Cook and Crosland.

10. Mullinax stated that, after SBC filed, he and Davenport instructed Greer to conduct a frequency search for Saluda to see if any

[6] All exhibit references are to exhibits received in *this* proceeding.

frequency other than 1090 kHz was usable there, and that, on February 21, 1967, Greer wrote to W. J. Holey, SBC's engineer, to suggest another frequency usable in Saluda which would require a two-tower directional antenna system and which would provide greater coverage than 1090 kHz. The affidavit recited that Holey wrote Greer, March 1, 1967, saying that he had discussed the frequency change with SBC and they were not interested. (B/B Ex. 6.)

11. Mullinax's affidavit further recited that he and Davenport visited Ted B. Wyndham, one of the principals of SBC, in Greenwood on March 17, 1967. The conversation began with Mullinax and Davenport offering reimbursement of SBC's expenses if SBC would withdraw. Wyndham stated that he had become interested in a station about one year earlier (which Mullinax identified as the time when United began looking for a transmitter site in Greenwood). Mullinax stated that Wyndham said he had considered filing for Greenwood, but that Douglas Featherstone, owner of WCRS and referred to by Wyndham as a friend, had said Saluda would be a better place for a station. The affidavit also pointed out that Wyndham's and Featherstone's offices were in the same building and adjacent. (B/B Ex. 6.)

12. Mullinax averred that Wyndham said that Jim Warren, chief engineer at WGSW, had helped prepare the SBC application. When Mullinax asked Wyndham if SBC had seriously considered the frequency change United proposed, Wyndham replied that he had not been informed of any proposal for a frequency change by Holey. Mullinax and Davenport explained the proposal to Wyndham and, according to Mullinax, Wyndham said he would consider it. However, Mullinax stated, Wyndham never communicated further with United about the proposal. (B/B Ex. 6.)

13. Davenport's affidavit confirmed Mullinax's affidavit. Greer's affidavit confirmed that Mullinax had telephoned him on or about September 12, 1966, and conveyed the information recited in Mullinax's affidavit regarding the September 12, 1966 meetings between Mullinax, Davenport, and Cook, and between Mullinax, Davenport, and Crosland. Greer also confirmed that he had written Holey regarding a possible change in the frequency of SBC and had received Holey's reply that SBC was not interested in the proposed change. (United Ex. 9.)

14. On the basis of the affidavits summarized above, United alleged that the following facts supported an inference that the SBC application was a strike application:

a. The managers and owners of the two existing Greenwood stations stand to benefit financially if the United application is denied.

b. Cook and Crosland, the respective managers of Stations WGSW and WCRS, both Greenwood, conferred about the possibility of opposing an application for a third Greenwood station even before the United application was filed, and the methods of opposition discussed in the conference included the filing of a competing application at Saluda.

c. Cook offered to pay the United principals the profits they expected to make for the first few years, as well as reimburse their expenses, if they would withdraw their application.

d. Cook told the principals of United that the 1090 kHz frequency could be used in Saluda and that he (Cook) knew of people in Greenwood who would file for it.

e. Although an alternate frequency, which would afford much better service than the SBC proposal was available, SBC decided to go through the expense and delay of a hearing rather than amend its application. Furthermore, although the availability of the alternate frequency was made known to SBC's consulting engineer, and he replied that the frequency change had been discussed "with his clients," a principal of SBC indicated he was not aware of the alternate frequency some seventeen days after the date of the engineer's reply.

f. A principal of SBC first considered filing an application for Greenwood, but Featherstone, the owner of an existing Greenwood station, persuaded him to file for Saluda. These two individuals, both of whom are attorneys, also apparently have a professional relationship and share adjoining offices.

g. The chief engineer of WGSW in Greenwood assisted the SBC principals in preparing their application.

15. The foregoing paragraphs, summarizing the allegations contained in United's Petition for Enlargement of Issues, and the affidavits attached thereto, introduce the various persons and contentions involved in this proceeding. It is now desirable to discuss the circumstances pertaining to the preparation of the respective applications and the events subsequent to the filing of the applications.

THE UNITED APPLICATION

16. Mullinax and Davenport conceived the idea of setting up United in early January 1966. They requested that Palmer Greer, a consulting engineer, make a frequency search for Greenwood. Greer's report, dated February 10, 1966, stated that 1090 kHz was available in Greenwood, and, if any conflict developed for 1090 kHz, then 1560 kHz "may be usable." (United Ex. 2.) Greer recommended that United apply for 1090 kHz, and explained to Mullinax and Davenport the amount of land which would be necessary for a transmitter site for operation on 1090 kHz. Mullinax and Davenport decided to apply for 1090 kHz. Armed with material prepared by Greer showing the size of the plot of land necessary for an antenna and ground system, Mullinax went to Greenwood in late February and March 1966 to obtain the necessary site.

17. Mullinax and McLean Hall, a Greenville, South Carolina real estate broker, went to Greenwood on Good Friday 1966 in search of a transmitter site. They met Alston Calhoun, a Greenwood real estate broker, and Reverend Coker, who owned a plot of land in Greenwood. Mullinax told these men that he was interested in land for the purpose of putting a radio station in Greenwood and that the land would be

used for a tower and ground system. *Mullinax did not think he mentioned the frequency on which the station would operate, but he was not certain.* Around April 1, 1966, United entered into a 30-day option agreement to purchase Coker's land. Greer and United had agreed that, if United found a parcel of land suitable for the transmitter site, Greer would inspect the land. Greer inspected the Coker property and informed Mullinax that the plot was too small.

18. After Greer rejected the Coker property, Mullinax went back to Hall. Hall was tied up with other matters and said that Mullinax should work with Calhoun. Mullinax requested that Calhoun look for another plot. Within about 30 days, Mullinax decided that Calhoun was not producing. Mullinax decided to look for a piece of land himself and discharged Calhoun. *Mullinax did not know how many persons (if any) in Greenwood Calhoun had approached about land during the 30 days, or whether he informed people about the purpose for which the land was being sought.*

19. Mullinax, after he took over the task of looking for land for the transmitter site, spoke to about 25 residents of the Greenwood area. None of the people he spoke to asked him the purpose for which the land was sought. When speaking to people regarding land, Mullinax concealed his plans for the land. Mullinax identified himself by name when making land inquiries, but did not indicate that he was associated with Station WESC, Greenville.

20. In 1966, Mullinax was manager of WESC, although he stated that his duties were those of sales manager. In 1966, Mullinax was also a personality on a morning country and western program on WESC, and he used his own name on the program. In 1966, WESC's 0.5 mv/m contour included all of Greenwood County, in which Greenwood is located. At this time, Mullinax received a small amount of fan mail from Greenwood and he represented to prospective advertisers on his program that he had listeners in Greenwood County.

21. Mullinax found a second parcel of land in July 1966 and Greer inspected it.

22. The conducting of a community survey of Greenwood for the application was Davenport's responsibility, but, while he was inquiring about land, Mullinax asked people what they liked to hear on the radio. He never told anyone he was interested in establishing another station in Greenwood and they never asked him why he wanted to know their radio interests. Mullinax believed that Davenport's activity regarding the survey began in late May 1966. Because Mullinax was busy with other matters, he did not confer with Davenport regarding the survey until August 1966, when they began to put together the United application.

23. Davenport visited Greenwood in June and July 1966 to conduct the survey. He visited businessmen, government and community leaders, case workers at service agencies, and members of the general public. He told interviewees that he was from WESC in Greenville [7] and hoped to establish a new station in Greenwood. He did not tell any

[7] Davenport was general manager of WESC in 1966. He had no ownership interest in the station.

interviewees the hours of operation, power, or frequency of the proposed station.

24. Greer did the engineering work on United's application. Greer did not reveal the frequency for which United intended to file to anyone other than United's principals or counsel.

THE SBC APPLICATION

25. What ultimately became the Saluda Broadcasting Company began as an oral joint venture agreement between Ted B. Wyndham, a Greenwood lawyer, and James W. Warren, chief engineer at WGSW. Wyndham came to Greenwood in June 1965 and met Warren a few months later. They met because they were neighbors and because Wyndham's office was close to WGSW. They began having coffee together. Warren and Wyndham first began discussing the possibility of obtaining a construction permit for a broadcast station late in 1965, but no action was taken until 1966. Wyndham first became interested in establishing a radio broadcast station somewhere in the Greenwood area in late 1965 or early 1966 and proposed the idea to Warren.

26. According to Warren, in early 1966, they discussed available frequencies and selected Saluda for the location. They did not have a town in mind at first, but ultimately had a frequency search made for Saluda because Warren believed that Saluda looked like a small town with possibilities and that it was the best choice in the area. At some point in their discussions, they considered applying for a station in Greenwood, but their initial discussions did not deal with Greenwood.

27. In an affidavit executed May 17, 1969, and filed as an attachment to SBC's Opposition to United's Petition for Enlargement of Issues in Dockets 18503 and 18504, Wyndham stated that he and Warren first considered filing to construct a station in Greenwood, but rejected that idea because it would have cost Warren his job at WGSW and because Warren said it was easier to get a grant in a community with no stations (United Ex. 1, paragraph 4). At the hearing, however, Wyndham stated that he and Warren decided not to file for Greenwood because it already had two AM stations, not because filing for Greenwood would cost Warren his job. (Warren also denied making such a statement to Wyndham.) Regarding the choice of Saluda, Wyndham testified that he and Warren were looking for a town without any station, within 30 or 40 miles of Greenwood, and they concluded that Saluda [8] had growth potential, with industries going there.

28. On April 20, 1966, Warren wrote Robert D. Lambert, a consulting engineer in Columbia, South Carolina, requesting a frequency search for Saluda. Warren's letter said that the information transmitted was in reference to their last telephone conversation and stated that Lambert "said in our first telephone conversation that the clearance [for a station in Saluda] would be real close, a matter of a few miles one way or the other." The letter stated that a check for $150 was enclosed to cover the cost of the search (B/B Ex. 1). Warren paid

[8] Saluda is 30 miles from Greenwood.

for the search. Warren chose Lambert for the search because he was familiar with Lambert from professional advertising sent by Lambert to WGSW and referred by Cook to Warren.

29. On May 10, 1966, Lambert sent a letter to Warren giving the results of the frequency search for Saluda. The letter stated that 1090 kHz with a .5 kw power could be used daytime only, and that a few other frequencies might be used with .25 kw power (B/B Ex. 2). Lambert also stated:

> As I mentioned on the telephone, in a previous frequency search for another part of the state, I have suggested the possibility of 1090 kcs, and, if this were applied for in that location, I could not handle the engineering portion of your application for this same frequency due to the conflict of interests which I am sure you understand. (B/B Ex. 2.)

Warren did not recall discussing 1090 kHz with Lambert during a telephone call, but he was sure that it was discussed if Lambert so indicated in the letter. The frequency search in another part of the state, referred to by Lambert, had not been requested by him (Warren). He had not discussed any specific frequency with Lambert when he requested the frequency search for Saluda. Warren said that he merely asked Lambert to find an available non-directional frequency in Saluda. Warren never mentioned 1090 kHz prior to receipt of Lambert's letter of May 10, 1966.

30. At the time Warren requested Lambert to perform the frequency search, he was not aware of anyone being interested in filing for a new station in Greenwood. *At about this same time, he mentioned his interest in a station to Cook.* Warren asked Cook his opinion of Saluda as a place for a station and Cook replied that he thought Saluda was too small. Warren claims he did not mention to Cook any proposed frequency, and they had no further discussions about this subject until United filed its application.

31. *Cook acknowledged having a discussion, in April 1966, with Warren regarding a proposed operation in Saluda.* Warren had talked to Cook about his interest in owning a small station and asked him what he thought about Saluda. Cook said it was too small. Warren told him that the people and merchants of Saluda were enthusiastic about a station and Cook said Warren might be able to make it if he ran the station himself and sold and did some of the announcing. Cook and Warren discussed whether the Saluda station would serve Greenwood County; and Warren indicated he hoped to sell advertising in Greenwood County and Greenwood. Cook claims that, at this time, Warren did not indicate the frequency on which the proposed station would operate. Warren mentioned a power of 500 to 1000 watts.[9] Finally, Cook realized that a station with 500 or 1000 watts power in Saluda would cover Greenwood approximately as well as WGSW covered Saluda, and that WGSW covered Saluda well and represented to advertisers that they had a good audience in Saluda. However, Cook alleged that he was not concerned about a Saluda station reducing WGSW's audience in Greenwood, because people prefer stations in

[9] It is most curious that Warren, a radio engineer, would mention the power, but not the frequency, particularly in light of the contemporaneous consideration, with Cook, of expected coverage.

their own community and county, and because he could not prevent Warren from filing for the station if Warren wanted to do so.[10]

32. Wyndham and Warren worked on an application for Saluda during the summer and early fall of 1966. Because Wyndham had no familiarity with Commission forms, Warren helped him with most of the application, not just the engineering portions.

33. On September 12, 1966, Cook informed Warren that United had filed for Greenwood. Warren asked what frequency they had applied for. Cook responded 1090 kHz. Warren said that was the frequency he was considering for Saluda. Warren testified that, prior to that time, he had not known or speculated that 1090 kHz could be used in Greenwood.

34. Cook alleged that he was not concerned, at that time, about any conflict between the Saluda and Greenwood applications because he did not think Warren would file. Cook thought Warren would give up because United had beaten them to filing. However, Cook believed, at that time, that the Commission generally preferred providing a first facility to one community over a third facility to another (which would militate in favor of a grant to Saluda over Greenwood).

35. After learning of United's application, Warren and Wyndham re-evaluated the idea of filing an application for Saluda. Warren did not encourage or discourage filing, but left the decision to Wyndham. Warren informed Wyndham that the Saluda and Greenwood applications would conflict and they might, or might not, get a grant.

36. After United filed its application, Wyndham decided that he still wanted to pursue a station for Saluda and that he wanted Warren to remain his partner. They realized they would have to participate in a hearing.

37. It was necessary to retain another consulting engineer because Lambert had a conflict of interest. Warren called Greer, but he was not home.[11] Warren then called W. J. Holey, a Georgia consulting engineer.[12] Warren did not attempt to contact any other South Carolina consulting engineers prior to contacting Holey. Warren informed Holey that he (Warren) and Wyndham were going to file for 1090 kHz in Saluda and wanted Holey to do the engineering work on the application. Wyndham could not recall whether he and Warren had settled on 1090 kHz when they hired Holey, but he said that Holey conducted a frequency search and said that 1090 kHz was the only feasible frequency.

38. The understanding that Warren and Wyndham had regarding financing of the Saluda application was that each of them would contribute about $7500 to the venture. Warren, at that time, had assets of approximately $1200–1500 and one-half interest in a house in Arizona (the other one-half interest was owned by his sisters). Warren thought he could get a loan of $5000 on his interest in the house. He believed that he had good credit. Wyndham did not explain how he

[10] As noted, *infra*, in this decision, Cook clearly *did* have an option open to use as a lever to *discourage* Warren's filing, at the very least, i.e., to tell Warren that, if he prosecuted his proposed application, he would have to give up his employment with WGSW. Cook either knew, or could have readily deduced, that Warren was entirely dependent on his salary from WGSW for his support and sustenance.

[11] Greer, of course, would have also had a conflict because he represented United.

[12] This was sometime in September or October 1966.

intended, at that time, to provide his share of the expenses. Wyndham's balance sheet, as of April 10, 1967, filed in Docket No. 18504, showed current assets of $7650, current liabilities of $3250, and net worth of $2800 (Official Notice taken).

39. After he and Wyndham decided to pursue the Saluda application, Warren informed Cook of this fact. When Cook was told by Warren, in October 1966, that Warren and Wyndham intended to go ahead with the Saluda application, he informed W. C. Woodall, who owned 37½ percent of Radio Greenwood, regarding these facts.[13] Cook knew that applications for the same frequency, in towns as close together as Greenwood and Saluda, would be mutually exclusive. Woodall advised Cook to call the station's Washington counsel to find out what action should be taken, and whether Warren could remain at WGSW. *Cook did not actually confer with Washington communications counsel until Warren indicated that he and Wyndham intended to file for Saluda, because he (Cook) was not concerned about Warren's interest in Saluda until it became apparent that Warren's intention to file an application was firm.*

40. After conferring with Washington communications counsel, Cook informed Warren that he would have to leave his employment with WGSW if he wished to continue in the Saluda application, or he could drop out of the Saluda application and continue to work for WGSW. Warren informed Cook, a day or two later, that he had decided to remain employed at WGSW and to drop out of the Saluda application.

41. When Warren decided to withdraw, C. Bruce Barksdale, whom Wyndham had approached in the summer of 1966 regarding participation in a station for Saluda, replaced Warren. On October 24, 1966, Warren wrote Holey, transmitting partial payment of $400 for engineering services, and informed Holey that he had elected to drop out of the Saluda venture in order to retain his job at WGSW. The $400 was supplied by Wyndham. The only expense incurred, prior to that payment to Holey, was the $150 paid by Warren to Lambert for the frequency search for Saluda. Because Wyndham had done some legal work for Warren without charge, Warren did not ask for any contribution by Wyndham for the $150 he had earlier expended.

42. Most of the work on the Saluda application had been completed when Warren withdrew. After Warren's withdrawal, Wyndham occasionally asked him questions regarding the application and sought his advice, but Warren did not actually do any physical work on it. Prior to filing of the SBC application, Wyndham relied solely on Warren for information regarding procedures for such filing. Cook asked Warren, after he had elected to stay at WGSW, if he had been discussing the Saluda application with Wyndham and Barksdale. When Warren replied that he had been discussing it, Cook reprimanded him and reminded him of his election to stay with WGSW and drop out of the Saluda venture.

[13] Cook leaves the impression that this was the first time he informed his principal associate what was going on in this connection. Assuming it to be true, the circumstance strengthens the Examiner's conclusions, *infra*, concerning Cook's "game plan."

43. Material filed with the SBC application shows that SBC was incorporated October 31, 1966. An equipment proposal for SBC from Gates Radio Company was dated October 31, 1966. A bank loan commitment for SBC was dated November 10, 1966. The SBC transmitter site agreement was dated November 16, 1966. The SBC application was filed with the Commission on November 16, 1966.[14]

THE 1966 SOUTH CAROLINA BROADCASTERS ASSOCIATION CONVENTION

44. At the South Carolina Broadcasters Association convention held in July 1966, Mullinax and Cook discussed the rumor that some persons associated with a Greenville station intended to file for a new station in Greenwood. Cook said he had last heard this rumor from Crosland, and he asked Mullinax if he knew anything about it. Mullinax said he did not. Cook told Mullinax he believed that someone would put a third station into Anderson before Greenwood, because Anderson was larger, and that he had heard of some interest in putting a station in Saluda. Mullinax said Saluda was too small for a station. The convention was held just after Mullinax had made arrangements for the second piece of land in Greenwood to be used for a transmitter site.

THE AUGUST 1966 MEETING BETWEEN COOK AND CROSLAND

45. Crosland testified that he telephoned Cook, in August 1966, to inquire whether Cook had any information about an application for a new station in Greenwood. Crosland wanted the information so he could "adjust and fortify [his] operation to meet any possible new competition." According to Crosland, Cook said he did have some information and would come over to Crosland's office, which, at that time, was four or five blocks away from Cook's office. Cook arrived about one hour after the telephone conversation.

46. According to Crosland, Cook said he had learned that two men associated with a Greenville station were going to file for 1090 kHz, 1 kw in Greenwood. Cook did not state how he had learned which frequency was to be used for the Greenwood application and Crosland did not inquire about it. Cook seemed visibly concerned about the additional competition and said the market would not support three AM stations. *According to Crosland, Cook said that Warren, WGSW's chief engineer, and Wyndham were planning to file for a station and had an engineering survey which showed that 1090 kHz was available for Saluda. Cook suggested that Grenco and Radio Greenwood consider encouraging the Saluda application, since it would conflict with an application for a new station in Greenwood.*[15] Cook did not further explain how they could "encourage" the Saluda application, and Crosland made no suggestion in that regard. Crosland testified that he told Cook he would not participate in encouragement of the Saluda application because the Commission could consider that as

[14] Official Notice taken.

[15] This statement also clearly supports the Examiner's conclusions, *infra*, concerning Cook's "adoption" of SBC's application as a "strike" application which he encouraged and which he openly used in an effort to bluff, at least, United into abandonment of its application.

fostering a strike application. *Cook replied that he did not want any trouble with the Commission and, therefore, would consult with WGSW's communications counsel about Warren's role in the Saluda venture, which, Cook said, was wholly personal and independent of WGSW.*[16]

47. Cook flatly denied meeting with Crosland in August 1966, and testified that he could not have spoken to Crosland about 1090 kHz in August 1966 because he did not know about 1090 kHz until Mullinax and Davenport informed him, in September 1966, that they had filed for 1090 kHz in Greenwood. Cook further testified that he never proposed to Crosland that they join forces to fight a third AM station in Greenwood. Cook stated that, in early summer 1966, he had casually discussed the rumors regarding a new Greenwood station with Crosland on the street and that Crosland said that the parties involved were from Greenville. Cook acknowledged that he talked to Crosland in October 1966 about the proposed third AM station and the financial effects thereof, but denied that he had discussed Warren's and Wyndham's interest in Saluda, or that he had proposed that Grenco and Radio Greenwood principals support a Saluda application.

48. Cook testified that he and Crosland are friends and that he was shocked at Crosland's testimony regarding these matters. On the other hand, Crosland testified that he has known Cook for about 17 years and regards him as a "clean competitor."

THE SEPTEMBER 12, 1966 MEETINGS[17]

49. On September 12, 1966, Mullinax and Davenport paid courtesy calls on Crosland and Cook to tell them that United's application for a new station in Greenwood had been filed. They visited Crosland first. According to Crosland, he told them that Grenco would not oppose them, but that he was skeptical that Greenwood could sustain three AM stations. He humorously told them that he wished they would file for Ninety-Six, a small town nine miles from Greenwood; and also said that Anderson, a community 44 miles from Greenwood, would support another station. But he did not suggest that they amend to specify Anderson. He suggested that they would have to run a tight operation, with as few personnel as possible. Mullinax and Davenport told him that they planned a country and western music format. Crosland did not make any notes regarding this meeting.

50. The main purpose for the visit to Crosland was to inform him of the United application, with a secondary purpose of finding out his attitude towards the application. The meeting was friendly. Mullinax generally confirmed Crosland's relation of what transpired at the meeting, but further alleged that Crosland said that Cook had approached Crosland about taking the 1090 kHz frequency outside Greenwood to Saluda, and that Crosland said he had told Cook that he would not be a party to such subterfuge. In response to advice of Greer during a telephone conversation about the Crosland meeting,

[16] An action which he did not take until *October 1966*, when SBC definitely decided to file.

[17] These meetings are chronicled in the affidavits discussed, *supra*, in paragraphs 5–14 inclusive. We treat now with the record testimony concerning these events.

and one on the same day with Cook, Mullinax typed out notes regarding this conversation on September 12, 1966.

51. Mullinax's typed notes regarding the visit with Crosland (United Ex. 7) generally confirm *his* claims as to what transpired.

52. Davenport confirmed that Mullinax typed notes regarding the visit to Crosland on the day of the visit. Davenport read the notes after they were typed and thought they were a true description of the meeting with Crosland. Greer received a copy of these notes in the mail a few days after September 12, 1966, and the notes agreed with Greer's recollection of what Mullinax had told him on the telephone on September 12, 1966, regarding the discussion with Crosland.

53. Mullinax and Davenport next met with Cook on September 12, 1966. According to Mullinax and Davenport, they told Cook they were filing for 1090 kHz, 1 kw, in Greenwood and that they wanted to be friendly competitors and were not going to undercut WGSW on advertising rates (although United had not yet prepared a rate card). Cook was friendly, but disturbed at the prospect of United's entry into Greenwood. He said the market could not take another station and that he was going to keep them out. Cook said he did not want them in Greenwood and asked them how much profit they anticipated in the first year of operation. Mullinax replied that, since Cook was already doing business in Greenwood, he ought to know. Cook offered to pay them their anticipated profits if they would not enter the market, and he talked about his Georgia associates having plenty of money. Davenport told Cook that United already had leases and had gone to much trouble and expense to file the application. Cook again offered to buy them out and told them to name their price. Mullinax and Davenport told Cook that they had not come to Greenwood to "shake down" the existing broadcasters; that they really wanted to operate a station in Greenwood; and that Davenport had grown up in Greenwood. As Mullinax and Davenport got ready to leave, Cook said that, if they did not stay out of Greenwood, he would cost them a lot of money. Mullinax asked how much and Cook replied $18,000 and eight years time. Cook said that he knew some people who would put a station in Saluda on 1090 kHz and that an application for Saluda would be preferred over an application for a third AM station in Greenwood.

54. Mullinax essentially corroborated Davenport in respect to what transpired at the meeting with Cook.

55. Cook testified that, when Mullinax and Davenport visited him on September 12, 1966, they told him they had visited Crosland, but did not relate what they had discussed with Crosland or that Crosland had mentioned Cook. Cook denied that he told them he knew an application for Greenwood had been in preparation; denied that he offered them their anticipated profits if they would withdraw; denied that he said he did not want any more competition; denied that he knew 1090 kHz could be used in Saluda, or that he knew people who would file for it for Saluda,[18] or that he stated his Georgia associate, Woodall, could pay them to withdraw the United application. Cook testified that

[18] Cook said that they discussed the financial impact of another station in Greenwood and that it would be difficult to support three AM stations. He also mentioned plans for a station in Saluda, but did not mention a planned frequency.

Mullinax and Davenport did say they had a transmitter site; that they had formed a corporation and had legal and engineering counsel; but Cook denied that he offered to reimburse them for these expenses if they would withdraw their application. Cook did not have any notes regarding this meeting, but said he refreshed his recollection of it when United filed its Petition for Enlargement of Issues in 1969.

56. After the discussion with Cook, Mullinax and Davenport returned to Greenville and Mullinax telephoned Greer. Mullinax related their conversation with Cook to Greer and Greer advised him to make notes regarding that conversation. Mullinax typed up notes on September 12, 1966. Davenport saw Mullinax's notes (United Ex. 6) the next morning and testified that he believed then, and believes now, that the notes are a fair summary of the events they describe. Greer testified that he received a copy of the notes in the mail shortly after September 12, 1966, and the notes agreed with his recollection of what Mullinax had told him on the telephone September 12, 1966, about the discussion with Cook.

57. Mullinax's notes (United Ex. 6) do not include any reference to Cook's alleged threat "to cost United $18,000" if Mullinax and Davenport would not withdraw the application (see paragraph 53, *supra*). Although Greer had told Mullinax that his notes could be important, Mullinax did not believe the notes would be important because he did not believe that Cook would go through with his threat. Mullinax had not mentioned the $18,000 "threat" in any pleadings before the Commission, and his testimony about it at the hearing was the first time the matter had been brought to the attention of the Commission.

THE FREQUENCY SEARCH FOR WGSW

58. Cook had a continuing interest in improvement of facilities for WGSW, and Warren was aware of that interest. Warren and Cook had discussed improvement of facilities for WGSW several times. Prior to the filing of United's application, WGSW had had some frequency searches made—one search for an FM frequency and one or two searches ordered by Woodall to see if WGSW could prove nighttime service, or go to 5 kw daytime power. After United filed its application, Cook contacted W. J. Holey and requested Holey to find out if any other frequencies besides 1090 kHz were available for Greenwood. Cook did not inquire about 1090 kHz (its availability being assumed because United had filed for it). Holey responded, by letter of September 16, 1966, and stated that the only available frequency which definitely complied with Commission Rules was 1090 kHz (B/B Ex. 7). Cook knew, when he received Holey's letter, that the coverage with 1 kw on 1090 kHz would be better than that with 1 kw on 1350 kHz (WGSW's facility), but he believed there was nothing he could do about that, and he never considered filing for 1090 kHz for WGSW.

59. Cook selected Holey to perform the frequency search, after United filed, because Holey had done the original application for WGSW, and his name was in their files. Cook had never previously

consulted Holey regarding engineering matters. This frequency search was the only one ordered by Cook for WGSW to that point in time.

60. Warren was not aware that Cook had called Holey in September 1966 to request a frequency search, and, during September 1966, he did not see Holey's letter regarding the results of that search. Warren did not discuss available frequencies for Greenwood with Cook after their September 12, 1966 conversation.

UNITED'S EFFORTS TO PERSUADE SBC TO CHANGE FREQUENCY

61. Mullinax, in late December 1966, requested that Greer conduct a frequency search for Saluda to see if SBC could utilize any frequency other than 1090 kHz and, thus, allow both applications to be granted without hearing. Greer made the search and established that 690 kHz could be used in Saluda with two towers, yielding better coverage than SBC's 1090 kHz proposal. United paid Greer for the search. Greer also informed Mullinax that 690 kHz could not be used in Greenwood. Mullinax requested that Greer give Holey, SBC's engineer, the information about 690 kHz and Greer subsequently told him (Mullinax) that he (Greer) had done so.

62. Greer confirmed that, in December 1966, a principal of United requested that he prepare a frequency search for Saluda and that the results were as depicted above. Greer spoke to Holey on the telephone on January 6, 1967, regarding the possibility of SBC utilizing 690 kHz. Greer took notes regarding that telephone conversation.

63. Greer's notes regarding the discussion of 690 kHz with Holey reveal that he telephoned Holey, pursuant to a January 4, 1967 discussion with SBC's communications counsel and Mullinax, during which they decided that Greer would propose to Holey that SBC change frequencies and that United would offer SBC its expenses to date in the 1090 kHz application. Greer called Holey and Holey said he would check 690 kHz, discuss it with SBC's principals, and then contact Greer. Greer told Holey that it would probably call for a two-tower directional antenna system and they discussed some technical matters. Greer told Holey that he would be in Atlanta in two weeks and could discuss the matter with Holey then. Greer and Holey did not meet in Atlanta.

64. On February 21, 1967, Greer wrote Holey to inquire whether Holey had discussed the possible frequency change with the SBC principals. Holey wrote Greer, on March 1, 1967, and stated that SBC did not want to amend to 690 kHz and that he could not recommend that they do so because of the excessive amount of field work that would be involved in an application for 690 kHz.

65. Greer's frequency search for Saluda did not alter his conclusion that 1090 kHz was the only usable frequency for Greenwood. He stated that, under the Commission's "no-go rule," an application which received interference was not acceptable in a town that already had a service, such as Greenwood; but, because Saluda did not have a first service, a 690 kHz application for Saluda would have been acceptable.

66. Greer also explained the differences between a non-directional operation on 1090 kHz and a two-tower directional antenna system

operation on 690 kHz at the time the United and SBC applications were pending. Because tower height and the length of a ground system are generally one-quarter wavelength, the 690 kHz operation would have required towers taller than the one tower required for 1090 kHz, and more land would have been necessary for the ground system. Greer estimated that the proposed 690 kHz operation would have required about 15 acres of land, compared to about four acres for the proposed 1090 kHz operation. He estimated that the additional costs for more and taller towers, more copper for a ground system, and other additional equipment costs for 690 kHz (not required for 1090 kHz) would have been approximately $15,000, exclusive of the additional real estate costs. Also, he explained that, in 1966, Commission rules required that a first-class operator be present at all times of operation of a directional antenna system, but not for a non-directional antenna; that a directional antenna system had to be on the air for one year without difficulties in operation before the Commission would authorize remote control; and that the Commission required certain weekly measurements for a directional antenna system which were not required of a non-directional antenna. Greer regarded Holey's determination that he could not recommend the 690 kHz operation to SBC as reasonable from an engineering standpoint.

THE MEETING OF MARCH 17, 1967, BETWEEN MULLINAX, DAVENPORT, AND WYNDHAM

67. Upon receipt by Greer of Holey's letter of March 1, 1967, stating that SBC was not interested in amending its application to 690 kHz, Mullinax and Davenport decided to discuss the matter with SBC's principals. A secondary purpose of the visit was to investigate the possibility that SBC's application might be a strike application. The meeting was to have included Barksdale, but he was out of town, so Mullinax, Davenport and Wyndham met in Wyndham's office. Mullinax and Davenport told Wyndham that they suggested that SBC switch to 690 kHz. Wyndham indicated that he did not know that 690 kHz was available for Saluda, and that he would consider it. Mullinax never heard from Wyndham regarding the proposal.

ACCORDING TO MULLINAX AND DAVENPORT

68. At the meeting, Wyndham remarked how successful WCRS owner Douglas Featherstone was and that he wanted to emulate him. Wyndham informed them that he had considered applying for a station in Greenwood, but that he did not want to anger his friend Featherstone, so he had decided he could emulate Featherstone in Saluda, which had no station. Wyndham also noted that Featherstone's offices were adjacent to his. Wyndham said he was a "protege" of Featherstone and inferred that the latter had helped pay his way through law school.

69. Wyndham expressed concern that Mullinax and Davenport might regard the SBC application as a "block" application. Mullinax and Davenport were surprised at his use of the word "block." Wynd-

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ham did not indicate who had been alleging that the SBC application was a block application. Mullinax did not recall whether he used the term "block" in speaking to Wyndham. Mullinax had always interchanged the terms "block" and "strike." Mullinax explained that he was surprised at Wyndham's use of the word "block," because Wyndham was not a communications attorney.

70. Davenport made an offer to reimburse SBC's expenses if it would amend its application to 690 kHz. Wyndham did not accept the offer. Mullinax, at this meeting, first learned of Warren's role in the Saluda venture. Wyndham explained that Warren's employers had made Warren choose between his employment at WGSW and pursuit of the Saluda application.

71. Mullinax explained his failure to inform the Commission of Warren's role in the Saluda application for a period of two years (until the filing of the Petition for Enlargement of Issues in 1969), saying that he did not know he could do anything with this information until the beginning of the hearing on the 1090 kHz applications, and that he had given the information to United's communications counsel soon after March 17, 1967.

72. Mullinax made some notes regarding the meeting on that day, and he represented the notes (United Ex. 10) as a true and correct portrayal of the meeting with Wyndham. Mullinax's notes generally confirm his version of what transpired at the meeting.

73. Mullinax's notes concluded with eight "Important observations" regarding Wyndham:

1. He seems to know the importance of 1090 in that pt. of the state.
2. He seems to look upon it as a law case.
3. Admits Warren helped & Warren got Holly (sic).
4. Places the date one year ago after talk started about 3rd G'wood station.
5. Knows nothing about radio.
6. Admits that it's Barksdale's money but quickly adds I'll pay my part.
7. Claims a close friendship with Featherstone.
8. Names several Greenwood B'casters but omits the name of Cook.

74. Regarding his "Important observations," Mullinax testified that he did not know what the fact that Wyndham looked at the matter as a "law case" meant. Wyndham used the word "case" in the conversation.

75. On March 17, 1967, upon his return to Greenville from the meeting with Wyndham, Mullinax typed up a set of notes based on the handwritten notes described above, and his independent recollection of the discussion. The typed notes (United Ex. 8) generally reiterated the material included in the handwritten notes and contain the following additional material: Featherstone seems to be a powerful influence over Wyndham. Wyndham admits that Featherstone encouraged Wyndham's entrance into broadcasting as a way to grow financially. When Davenport explained the possibility of using 690 kHz in Saluda, they discussed using 690 kHz in Greenwood, but Davenport said none of them knew enough about engineering to discuss it and he would have Greer send details to SBC. Wyndham said that his opinion that SBC could make a lot of money in Saluda was supported by Featherstone and other unnamed members of the Greenwood radio colony.

76. Other material included in the typed notes refers to the fact that Wyndham said his spots would be priced a little under Greenwood stations' prices and that he would need an announcer-manager or announcer-salesman for the station; that Wyndham referred to the SBC application as a "case"; that he did not once express compassion for the residents of Saluda or their needs; that Wyndham discussed some of the businesses in Saluda and the population of the city and the county; and that Wyndham told Mullinax and Davenport that SBC's communications counsel was Midlen and Harrison. The typed notes indicate that Mullinax and Davenport agreed that Wyndham did not once mention Cook or Crosland, although he made efforts to mention people on their staffs.

77. After Mullinax typed United Exhibit 8, he showed the notes to Davenport and asked if they checked with Davenport's recollection of the meeting. Davenport said they did and he did not make any changes or suggestions. Mullinax sent copies of the typed notes to Greer and United's communications counsel. Greer received a copy of the typed notes shortly after March 17, 1967, and the notes were in agreement with the information Mullinax had given him about the meeting during a telephone conversation between the date of the meeting and the date of Greer's receipt of the copy of the notes.

ACCORDING TO WYNDHAM

78. He did not mention Featherstone at all during the conversation with Mullinax and Davenport on March 17, 1967, or, if he did, he did not claim friendship with Featherstone since they had only met in 1967. Wyndham did not recall whether they offered to reimburse SBC if it withdrew its application. He may have told Mullinax and Davenport that he had become interested in a station about one year prior to the meeting, but he did not say that he became interested in a station when he heard rumors about a new Greenwood station. He did not deny discussing Warren's aid in preparation of the SBC application, and in securing the services of Holey, and that Warren had dropped out due to conflict of interest with his employment at WGSW. He recalled discussing directional antennas. He did not take any notes regarding the meeting.

THE MEETING OF APRIL 11, 1969, BETWEEN MULLINAX, DAVENPORT, AND CROSLAND

ACCORDING TO MULLINAX AND DAVENPORT

79. On April 11, 1969, Mullinax and Davenport visited Crosland. The purpose of the visit was to request that Crosland confirm affidavits executed by Mullinax and Davenport regarding the meeting of the three of them on September 12, 1966. Mullinax made some notes regarding the April 11, 1969 meeting upon Mullinax's return to Greenville on the same day. The notes (WGSW Ex. 4) state that, after some general conversation, Davenport told Crosland that he could help Davenport own a station by recalling the September 12, 1966 conversation. Crosland examined the materials which he was being asked to confirm and said that it did not sound like him. Crosland said that

he remembered some of the things set out in the affidavit, such as Anderson's need for another station and his suggestion that Mullinax and Davenport file for Ninety-Six, but he did not recall discussing the type of station that United planned and suggesting that they run it cheap and make money. The notes conclude with an observation that Mullinax knew Crosland ws lying because his hands shook, his voice quivered, and because Crosland had said he would give them an affidavit that they were there on September 12, 1966 before he read the document prepared by Mullinax and Davenport (WGSW Ex. 4).

80. Crosland said he would give them an affidavit stating that they had met on September 12, 1966, but not discussing the details of the meeting. Mullinax was only interested in having Crosland affirm their account of the September 12, 1966 meeting, and, when he refused to do that, Mullinax was not interested in some other sort of affidavit from Crosland regarding the meeting. Davenport did not agree that Crosland was lying. Davenport told Mullinax so while Mullinax was writing out his notes. That did not alter Mullinax's opinion. He did not ask Davenport why he (Davenport) did not think Crosland had been lying.

81. Davenport had known Crosland for a long time and considered him a man of integrity and not a man who would lie about these matters. Davenport believed that Crosland could not remember what had occurred at the first meeting and he (Davenport) expressed that view to Mullinax.

ACCORDING TO CROSLAND

82. When Mullinax and Davenport asked for an affidavit from him concerning their 1966 discussion, he read the affidavit they requested him to sign and felt it was their version of the meeting and did not sound like him. He refused to give them an affidavit because the events at issue had occurred a few years ago, and he would have wanted time to consider them and/or seek the advice of counsel before making such a statement. Mullinax and Davenport did not inform him of the purpose to which they would put his affidavit until the end of the meeting, at which time Davenport said that United was going to file a petition to enlarge issues and expected to own WGSW as a result. He recalled that, at the 1969 meeting, in response to a question from Mullinax and Davenport, he told them that Wyndham's office was next to Featherstone's office, and he also told them that he knew Barksdale.

83. Although, on April 11, 1969, he did not recall advising Mullinax and Davenport, on September 12, 1966, that they should run a cheap and modest operation, at the hearing he recalled giving that advice and he recalled other details of the 1966 meeting. A few days after the 1969 meeting, he began to refresh his recollection and make notes regarding the 1966 meeting. He did not offer to give Mullinax and Davenport an affidavit regarding the 1966 meeting after refreshing his recollection and consulting with counsel.

84. Mullinax, on rebuttal, did not recall Davenport remarking to Crosland that they would take over WGSW as a result of the petition to enlarge issues, but said it would have been a typical Davenport remark. He stated that, until the hearing, he did not realize Crosland's

age; he had believed Crosland was younger. Mullinax believes that Crosland's age may explain the shaking hands and quivering voice referred to in Mullinax's notes. Finally, Mullinax did not believe that his recollection and Crosland's recollection regarding their 1966 meeting are in disagreement and he understands now why Crosland would not sign the affidavit in 1969.

THE MEETING OF APRIL 14, 1969, BETWEEN MULLINAX, DAVENPORT, AND COOK

ACCORDING TO MULLINAX AND DAVENPORT

85. On April 14, 1969, Mullinax, Davenport, and United's communications counsel visited Cook. The purpose of the meeting was to persuade Cook to "withdraw his influence upon Saluda" and to persuade him to convince SBC to change frequencies or drop out. They showed him some materials dealing with strike issue cases and told Cook that the information they had regarding SBC could jeopardize WGSW's license renewal if a strike issue were raised by United. Cook responded that he had no control over SBC.

86. Davenport showed Cook an affidavit he had executed (United Ex. 13). The affidavit recited that, during the September 12, 1966 meeting between Cook, Mullinax, and Davenport, Cook offered to pay them if they would withdraw United's application, and that Cook said that, if they would not withdraw, he could get some people to file for the same frequency in Saluda (United Ex. 13). At the time Davenport executed the affidavit, and at the time of the hearing, he believed the affidavit to be true and correct. In preparing it, he relied upon Mullinax's notes of the September 12, 1966 meeting.

87. Mullinax prepared notes regarding the April 14, 1969 meeting with Cook. These notes (WGSW Ex. 4) generally confirm the version of the meeting asserted by Mullinax and Davenport. United's attorney never read the notes. Mullinax's notes were in agreement with Davenport's recollection of what transpired at the 1969 meeting.

ACCORDING TO COOK

88. At the 1969 meeting, United's communications counsel told him that a petition to enlarge issues would be filed unless SBC withdrew. Cook told Mullinax, Davenport, and United's counsel that he had told Warren to choose between WGSW and the Saluda venture. Cook denied offering to pay United to withdraw at the time of the 1966 meeting. United's counsel showed Cook two strike cases and told Cook to read them over and call him if he changed his mind about getting SBC to withdraw.

OTHER AFFIDAVITS RELATING TO THE PETITION FOR ENLARGEMENT OF ISSUES

89. The filing of the Petition for Enlargement of Issues prompted execution of affidavits by Featherstone and Cook. Featherstone's affidavit, executed May 20, 1969 (Grenco Ex. 2), recited that he was not

aware of Wyndham's interest in a radio station until he received a copy of the Petition on or about April 23, 1969; that he first met Wyndham in the spring of 1967, when he (Featherstone) moved his law offices into the building in which Wyndham had his office; that their meeting occurred several months after the filing of the SBC application; that he had never discussed applications for radio stations with Wyndham until after the filing of the Petition for Enlargement of Issues; that he never suggested to Wyndham that Saluda was a better place than Greenwood for the establishment of a new station; and that he had never been associated in business or professionally with Wyndham (Grenco Ex. 2).

90. Cook executed an affidavit May 16, 1969 (Grenco Ex. 4), in which he stated that, during the 1966 meeting with Mullinax and Davenport, he discussed the economics of a new radio station for Greenwood, but did not offer reimbursement if United would withdraw its application; that he was aware of Warren's interest in a station in Saluda, but had no knowledge of what frequency was under consideration; that, in October 1966, on advice of communications counsel, he told Warren to choose between employment at WGSW and participation in an application for Saluda, and that Warren elected to remain at WGSW; that neither Cook, nor his fellow owners of WGSW, encouraged, planned, or financed the Saluda application; that any assistance Warren may have rendered SBC was not rendered on behalf of Radio Greenwood; and that, at the April 14, 1969 meeting, when United's lawyer said that a petition for a strike issue against SBC would be filed unless Cook convinced SBC to withdraw, and that a strike issue could jeopardize renewal of WGSW's license, he (Cook) told United that he had no control over SBC.

91. Mullinax received Featherstone's affidavit (Grenco Ex. 2) after it was filed in response to the Petition for Enlargement of Issues, and he realized that there was a contradiction between it and his affidavit (B/B Ex. 6) regarding whether or not Featherstone suggested or persuaded Wyndham to file for Saluda. Mullinax denied that his affidavit reference to Featherstone and Wyndham having adjacent offices (B/B Ex. 6, paragraph 10) was misleading, in that Featherstone had not even moved into the same building at the time of Mullinax and Davenport's March 17, 1967 conversation with Wyndham, because Mullinax had the impression that, as of March 17, 1967, Featherstone had either moved into the adjacent offices or was planning to do so. Mullinax did not examine the offices next to Wyndham's after talking to Wyndham.

DISMISSAL OF THE SBC APPLICATION

92. On December 10, 1969, SBC filed a petition requesting dismissal of its application, which was subsequently granted.[19] The principal reason for the dismissal request was that it was financially unfeasible to continue. SBC had spent $8,000–10,000 for legal counsel over a four-year period. SBC's counsel indicated that it might require another

[19] Official Notice taken (see paragraph 4 of the Initial Decision in Docket No. 18503, FCC 71D–72, released October 19, 1971).

$4,000–5,000 to pursue the hearing to its conclusion. SBC, on the advice of Warren and its counsel, originally anticipated obtaining a construction permit with expenditures of $3,000–5,000. SBC had anticipated prevailing in the hearing, because Saluda did not have any stations, whereas Greenwood already had services. SBC had also expended at least $2,000 for engineering services during the course of the proceeding. SBC had never obtained an estimate of the total anticipated engineering costs to prosecute its application.

93. Another reason stated for the dismissal request was that Saluda's small size made it economically unfeasible to pursue the application. This constituted an apparent contradiction of Wyndham's explanation regarding the reasons for the choice of Saluda initially, but is tenable based on subsequent events. The population of Saluda County had not grown since 1950, though Wyndham originally anticipated some growth.

94. Wyndham met his share of the SBC expenses from his legal earnings, and he never actually borrowed money for the pursuit of the application, although he had arranged for a loan in order to make a financial showing in connection with the SBC application. The loan arrangements were made either at the suggestion of Warren or SBC's communications counsel, he could not recall which.

MISCELLANEOUS CONSIDERATIONS

95. Featherstone, the owner of Grenco, was unable to testify personally in this proceeding because of his physical condition (Grenco Ex. 1). But his affidavit (Grenco Ex. 2) is part of the record and is essentially uncontradicted in its showing of innocence of any "strike" participation.

96. Grenco did not financially, or otherwise, support SBC's application or oppose United's application. Crosland did not meet Wyndham until 1971. He has spoken to Warren only twice, both times regarding subject matter unrelated to this case. He did not know Mrs. O. C. Swindle, part owner of Radio Greenwood. He met Woodall when Woodall received the grant for WGSW, but had not seen him for many years prior to this proceeding. He did not converse with either Wyndham or Warren, and he had not discussed these matters with any WGSW employees.

97. Greer worked for Grenco until April 1965. Crosland's last discussion with Greer, prior to this proceeding, was in 1965, and that discussion did not involve available frequencies for Greenwood.

98. Wyndham confirmed that he did not meet Crosland before the summer of 1970.[20] He had not been reimbursed directly or indirectly by the principals of Grenco, or anyone on their behalf, for expenses incurred in the SBC application. Neither he nor his law partner represents the principals of Grenco, or any of their enterprises.

99. Warren has never worked for Featherstone, Crosland, or WCRS–AM or FM.

[20] Though Crosland said 1971 and Wyndham said 1970, the disparity is immaterial since the meeting was significantly after the events in issue.

100. Mullinax testified that the only evidence implicating Grenco, in his opinion, was Wyndham's mention, at the March 17, 1967 meeting, of his relationship with Featherstone and that he did not believe Crosland had aided SBC. Davenport testified that he now believes Wyndham tried to impress them by asserting a friendship with Featherstone that did not really exist, and that he does not believe Wyndham was acting in concert with Featherstone or Crosland in SBC.[21]

101. Cook did not personally, or through Radio Greenwood, or any other source, advance funds for the Saluda application. He alleges that he did not participate in the planning, preparation, or prosecution of the SBC application, or authorize anyone else, including Warren, to do so. He alleges that he did not authorize Warren to work on the Saluda application on WGSW time, or to use WGSW as a business address on Saluda correspondence, and he was not aware that Warren did so.[22] Cook says he never saw Lambert's letter to Warren with the results of the frequency search (B/B Ex. 2), which was addressed to Warren at WGSW. He believed that Warren would have been too busy with his work at WGSW to work on the Saluda application there.

102. Warren received no direct or indirect compensation from Radio Greenwood in 1966–1967, except his salary, an allowance for car expenses for news gathering, and a Christmas bonus of the same amount given all Radio Greenwood employees ($100 or $125). Warren's salary in 1966–1967 was $130 to $135 per week. Warren left the employment of Radio Greenwood in January 1971. At the time of hearing, Warren was not employed by Radio Greenwood, was receiving no compensation from Radio Greenwood, and there was no agreement to reemploy Warren at any time in the future.

103. Cook had no relationships with the individuals or institutions that pledged to make loans to SBC in connection with the SBC application. He knows Barksdale, but has no business or investment relationship with him.

104. The only consulting engineers who have done work for WGSW are Lambert and Holey. Prior to April 1966, Lambert had done some engineering work for WGSW, which had been arranged by Warren as chief engineer. The fee for the work was about $50. Cook testified that he was not aware of Warren's letter of April 20, 1966, to Lambert (B/B Ex. 1), and the fact that Warren had contacted Lambert regarding available frequencies. Lambert did some pre-sunrise authority work for WGSW in 1967, which had been arranged by Warren.

105. Woodall is a resident of Dawson, Georgia. He knew Warren to be an employee of WGSW. He took no steps to discourage prosecution of the United application and did not authorize anyone else to do so on his behalf. He did not learn about the United application until one or two days after it was filed, and did not learn of the SBC application until shortly after it was filed. He met Wyndham for the first time

[21] All of the parties to this proceeding now agree that Crosland and Grenco are blameless in respect to the issues in this proceeding.

[22] Warren, in his letter of April 20, 1966, requested Lambert to call him collect at Warren's office (B/B Ex. 1).

at this proceeding and does not know Barksdale. Neither he, nor anyone authorized by him, contacted Wyndham or Barksdale regarding the SBC application.

106. Woodall has known Holey for 25 years, and Holey has done work for some of the stations with which Woodall is associated, including WGSW. Woodall does not consider Holey to be the consulting engineer for WGSW. Holey is not on retainer for any of Woodall's stations and WGSW has used other consulting engineers.

107. Woodall's stations have frequency searches performed periodically to see if they can improve their facilities.

108. Woodall was not aware that Lambert had ever done consulting engineering work for WGSW, and he did not recall an application for pre-sunrise authority in 1967. Cook could have filed such an application without obtaining Woodall's approval. Routine expenditures for WGSW did not have to be reported by Cook to Woodall. Cook has authority to make decisions involving the station during the periods between Radio Greenwood Board of Directors meetings (Woodall, Cook, and Woodall's mother-in-law, Mrs. Swindle, constitute the Board of Directors). Woodall and Mrs. Swindle take no role in the day-to-day operation of the station; that is left to Cook. Cook would have had authority, in 1966, to give Warren a raise without consulting Woodall or Mrs. Swindle.

109. Woodall did not recall visiting WGSW during 1966. The annual Board of Directors meeting for 1966 was probably held in Dawson, Georgia. He did not recall talking to Warren during 1966. He was unaware that Warren was leaving the employment of WGSW until after he (Warren) had left, and he did not know why he left. As a general policy, all of his stations give Christmas bonuses. He did not attend the South Carolina Broadcasters Convention in 1966.

110. Mrs. Swindle did not testify in this proceeding. In an affidavit executed June 15, 1971, and received in evidence, she stated that she is 77 years old, is not active in the affairs of WGSW, and has no knowledge of, or information concerning, principals or agents of Grenco or Radio Greenwood supporting, or participating in, the SBC application in order to impede or obstruct the United application (WGSW Ex. 1).

111. Wyndham did not meet Cook until some time after he had met Warren. He alleged that he never discussed the SBC or United applications with Cook. He does not know Woodall or Mrs. Swindle. None of the principals of Radio Greenwood have reimbursed him directly, or indirectly, for the expenses he incurred in preparation and prosecution of the SBC application. Neither he, nor his law partner, has ever been counsel for any of the principals of Radio Greenwood or any of their enterprises. He did not believe that Warren or anyone else "used" him in the SBC application. He approached Warren about constructing a radio station and Warren never pushed him into the events at issue.

112. Warren had no bank accounts from January to March 1966. On April 1, 1966, he opened a checking account with a deposit of $1,400, which was a loan from a bank for purchase of a car. A few days later, a check for approximately $1,400 was drawn on the account to

pay for the car. He made all the payments on the car loan without assistance from Radio Greenwood or its principals. The only large entry in the account was a deposit of $1,500 on October 18, 1966. None of that sum came from Radio Greenwood or its principals.

113. WGSW loaned Warren $600 in January 1968, so he could pay an accumulation of small bills. He repaid the loan completely, without interest; the last payment being made September 13, 1968. Warren never received any other loans from the station.

114. Warren presently resides in Chesterfield, South Carolina, which is 157 miles from Greenwood. He is not presently doing any work for WGSW. He has no agreement or understanding with Radio Greenwood or its principals that he will be employed by them in the future.

115. Warren never discussed the Saluda application with Wyndham or Barksdale on the premises of WGSW. He never discussed his participation in the Saluda application with Woodall.

116. Warren testified in this proceeding on October 1, 1971, and November 12, 1971. He came to Washington two days prior to the first date he was scheduled to testify, in order to go over some of the material that was covered in the hearings conducted in Greenwood. This was done at the suggestion of Radio Greenwood's counsel. Warren went to Radio Greenwood's counsel's office and read some of the transcripts of this proceeding.

117. When he came to Washington, September 29, 1971, to testify on October 1, he and Cook flew to Washington on the same airplane, after meeting in Greenwood. Warren had come to Greenwood to pick up documents required for production at the hearing. Warren had informed Cook of the date on which he planned to come to Washington, and Cook indicated that he would come to Washington on the same date. Cook made the hotel reservations for both Warren and himself, and Cook made airline reservations for their return flight to South Carolina on October 1. Warren's expenses for his stay were not reimbursed by Radio Greenwood, its principals, or its counsel.[23]

118. Warren and Cook did not travel to Washington together for Warren's November 12, 1971 testimony. While in Washington, they stayed at the same hotel, but Cook had not made Warren's reservation. Warren had no knowledge of Cook's travel arrangements to return to South Carolina after the hearing, and he (Warren) did not discuss any aspects of this proceeding with Radio Greenwood, its principals, or its counsel during the time between his two appearances in this proceeding.

119. No party to this proceeding suggested to Warren that he retain counsel for the proceeding. His decision to do so was his own. None of the principals of Radio Greenwood, or its counsel, had indicated willingness to reimburse Warren for his legal expenses in this proceeding, and Warren intended to pay those expenses himself.

120. Thirteen persons with lengthy acquaintance with Cook affirmed that Cook has a reputation in Greenwood for truthfulness.

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[23] The Bureau subpoenaed Warren and, accordingly, the government reimbursed Warren's travel and accommodation expenses.

Conclusions

1. We come now to the ultimate determination of the question of whether the principals or agents of Grenco, Inc. and/or Radio Greenwood supported, or otherwise participated in, the preparation of the application of Saluda for the purpose of impeding or obstructing a grant of the application of United for a station at Greenwood. The issue is commonly referred to as a "strike" issue.

2. As the Commission stated in paragraph 4 of its designation order, a strike application is one whose principal, or incidental, motive or purpose is to obstruct or delay another application. The Commission noted that the guidelines to be used to determine whether an application is a strike application are: "(1) the timing of the application, (2) the economic and competitive benefit occurring from the application, (3) the good faith of the applicant, and (4) questions concerning a frequency study." Other factors which test the *bona fides* of the application include such determinations as: whether the purported strike applicant selects the same engineering and legal counsel as the licensee allegedly supporting the new application, and whether the community selected by the new applicant is a community genuinely able to support a station, etc.

3. We deal now with the possible involvement of Grenco in the Saluda application. The only item which might connect Grenco to SBC is Wyndham's statement regarding Featherstone's influence over Wyndham's selection of Saluda, and Featherstone's possible encouragement of Wyndham in the venture.

4. It is concluded that such remarks by Wyndham were false and were an exaggeration designed to impress the United principals. As the findings reflect, Featherstone first met Wyndham in the spring of 1967, long after the SBC application had been filed. Therefore, the alleged remarks of Featherstone could not have been made to Wyndham.

5. Crosland's revelation to Mullinax and Davenport that Cook, in August 1966, had proposed fostering a strike application against United is not an act which, if Grenco were a strike co-conspirator or participant, he would rationally undertake. Crosland's testimony relating to this matter is accepted as accurate and truthful, along with his rejection of Cook's proposal (note further discussion of this matter in paragraph 9, *et seq.*, *infra*).

6. Accordingly, it is found and concluded that Grenco and its principals have not participated in, or encouraged, the SBC application. It is further found and concluded that a grant of the applications of Grenco, Inc. for renewal of license for Stations WCRS and WCRS-FM would serve the public interest, convenience, and necessity, and such applications should be granted.[24]

7. We turn next to the possible involvement of Radio Greenwood with the filing of the SBC application. While the findings do not establish any connection between two of the principals of Radio Greenwood—Woodall and Mrs. Swindle—and the SBC application, the con-

[24] This conclusion is endorsed by all the parties to this proceeding.

duct of the third principal of Radio Greenwood—Cook—cannot be resolved in the same manner.

8. There is the conflicting testimony of Cook and Crosland as to whether they met in August 1966 and whether, at that meeting, Cook revealed knowledge of the frequency proposed by United for use in Greenwood and invited Crosland to join him in opposing the proposed application for a new station in Greenwood. There is also conflicting testimony as to whether Cook, at the September 12, 1966 meeting with Mullinax and Davenport, offered to pay them their anticipated revenues and expenses to that date if they would withdraw the United application, and as to whether Cook threatened to obstruct United's application through an application for Saluda when Mullinax and Davenport refused his offers. There is the further conflicting testimony (Cook on the one hand, and Mullinax and Davenport on the other) as to whether Cook told Mullinax and Davenport that he was going "to keep you out if I can"; that "It won't be hard. I have a hungry lawyer [25] and rich kid [26] who have little enough sense to take it out of town"; that "[if Saluda can't support a station] We can help him get some Greenwood business, and we have more than we can put on"; and "[if United files for some other frequency] there are other little towns around and we'll cross that bridge when we get to it." (WGSW Ex. 3).

9. As detailed in the paragraphs which follow, the findings support the ultimate conclusion that Cook did invite Crosland to participate in obstruction of the planned United application for 1090 kHz in Greenwood in August 1966; that after the United application was filed, Cook did offer to reimburse United to withdraw; and, when his offer was declined, threatened to obstruct the application.

10. Wyndham's and Warren's interest in establishing a broadcast station had its genesis in late 1965 or early 1966. The first significant overt act to bring their plan to fruition was the request to a consulting engineer, on April 20, 1966, that a frequency search be made for Saluda. The report of this frequency search was dated May 10, 1966 (see findings, paragraphs 28 and 29). Warren discussed his proposed application with Cook in April 1966 (see findings, paragraphs 30 and 31). Cook evidenced his concern, as early as July 1966, about the possibility that another station might be established in Greenwood. This is reflected in his queries to Mullinax during the state broadcasters' convention in that month (see findings, paragraph 44).

11. In February and March 1966, United commenced its search to obtain an antenna site in Greenwood. The activities in this connection continued through July 1966 (see findings, paragraphs 16, 17 and 18). United's community survey activities in Greenwood were conducted in June and July 1966 (see findings, paragraph 23). While Mullinax was looking for an antenna site and talking to people in Greenwood, he *was not certain* whether, in March 1966, he identified to outsiders the frequency proposed for use by United in Greenwood (see findings, paragraph 17). Mullinax, Davenport, and the real estate brokers acting in

[25] Wyndham.
[26] Barksdale.

their behalf, contacted various people in Greenwood during this interval and no one knows to what extent there may have been a revelation of the details of United's proposed application.

12. Holey, who produced the frequency search report for Warren, had done consulting work for WGSW and for Woodall, one of its principal stockholders and a multi-station owner, on various occasions over a span of 25 years.

13. Early and prompt identification of the frequency under consideration by United, and under consideration for Saluda, could have leaked out from any of the foregoing potential sources. That Cook would be strongly motivated to obtain all the information he could about his potential competitor in Greenwood, including the possible frequency which might be used, is both reasonable and logical. Likewise, to ascertain the frequency proposed to be used by Warren in Saluda would be a natural, reasonable, and logical pursuit by Cook because of its relationship of the competitive efforts of United and the employer-employee affinity of Warren. It is concluded that Cook did obtain knowledge of the proposed use of 1090 kHz by United and SBC, respectively, at a point in time very proximate to the time that each such entity came into the knowledge that it was the only frequency available for the proposed use.

14. That Cook met with Crosland in August 1966, or at some time prior to September 12, 1966, is indisputably clear despite Cook's denials. Crosland testified that such a meeting took place; that Cook knew the frequency proposed for use by United; that Cook knew of the proposed use of the same frequency by Warren and Wyndham in Saluda; and that Cook proposed joint action by Grenco and Radio Greenwood to frustrate successful prosecution of United's application. Cook testified that the meeting did not take place prior to September 12, 1966; that he did not know, prior to September 12, 1966, the frequency proposed to be used by United or the frequency proposed to be used in Saluda; and that he did not propose the joint effort to frustrate United's application.

15. Mullinax and Davenport testified that, at their meeting with Crosland on September 12, 1966 (which took place before their meeting with Cook on the same date), Crosland advised them of the details of his meeting with Cook in August 1966. This circumstance poses a single clear question. Either Crosland testified falsely about the August 1966 meeting and falsely related the story of that meeting to Mullinax and Davenport on September 12, 1966, or Crosland's testimony, and that of Mullinax and Davenport, as to what transpired on September 12, 1966, is true. As noted in paragraph 5 of the conclusions, Crosland's fabrication of such a story would not be rational and does not appear to be based on any tenable explanation other than it is true. It is concluded that his recital of that incident to Mullinax and Davenport on September 12, 1966, was the spontaneous expression of truth.

16. Crosland's demeanor at the hearing was that of an earnest and honest elderly gentleman [27] endeavoring to speak the truth to the best

[27] Crosland was 67 years of age at the time.

of his ability. It is the conclusion of the Examiner that the testimony of Crosland, Davenport and Mullinax concerning this event is true.

17. It is a fact that, when Crosland was later requested to put the details of the 1966 meeting with Cook in affidavit form for Mullinax and Davenport, he refused to do so. His refusal, upon reflection, and without specific advice of counsel, is understandable. He obviously perceived, from the context of his meeting with Davenport and Mullinax on September 12, 1966, that he and his organization were becoming embroiled in a very sticky situation which might endanger the status of WCRS and WCRS–FM. The refusal to deliver such an affidavit, *at that time*, was not a denial or a recantation of what he had earlier said. Indeed, in this proceeding, he testified freely and completely concerning the transaction in question.

18. The Mullinax and Davenport version of what transpired at the September 12, 1966 meeting was contemporaneously reduced to writing by them and relayed contemporaneously to their consulting engineer, Greer. Though the relay of such information to Greer constituted hearsay so far as Greer is concerned, his confirmation of the contemporaneous receipt of the information and its content is entitled to significant weight in reaching a determination as to the truth of the matters involved. That occurrence is, in a sense, part of the *res gestae*. The same observation obtains with respect to the Davenport and Mullinax testimony and notes concerning the matters which transpired between themselves and Cook at their meeting with him on September 12, 1966.

19. To find that Cook's testimony regarding these various matters is true would necessitate a finding that Cook is the victim of a conspiracy by Crosland, Mullinax and Davenport, at the very least. That conclusion is untenable.

20. The evidence establishes that one of the two persons responsible for initiating the Saluda application, and doing the bulk of the work involved in completing the application, was the chief engineer at Cook's station. Cook and Warren acknowledge that Cook was aware of Warren's interest in Saluda as of April 1966, prior to the filing of United's application, but approximately the same time that United's principals began contacting people in Greenwood regarding matters concerning their application. Cook's and Warren's testimony that they did not discuss the frequency a Saluda application would utilize and that they had no further discussions regarding the Saluda proposal between April and September 1966 is not plausible or believable. They acknowledged in their testimony that they discussed how well a Saluda station would cover Greenwood. Of course, that coverage would depend in significant degree on both the proposed power and frequency, and those data were surely revealed.

21. Cook stated that Warren was a valued employee of WGSW, but that, in October 1966, he told Warren he would have to leave the station if he applied for Saluda. Yet, Cook would have us believe that he was never interested enough in whether he would have to arrange to replace Warren as to warrant inquiry about the progress of Warren's plan for a Saluda station. Nor, apparently, was he concerned that such

station might be competitive with WGSW. These facts also strain credulity.

22. It is clear, from the findings, that Warren continued as an interested participant in the Saluda application, even after United had filed for Greenwood, and until shortly before SBC filed for Saluda. However, it became apparent to Cook, in October 1966, that Warren's continued association with an *actually filed* application for 1090 kHz in Saluda in competition with the United application for Greenwood would overtly cement, *for all the world to see*, Cook's interest in obstructing United's application, since Warren was still an employee of WGSW. Thus, it is clear why Cook told Warren, in October 1966, he could not remain employed at WGSW if he actively prosecuted the Saluda application.

23. There is some evidence to suggest that the Saluda application may have been less than completely *bona fide*. Warren and Wyndham contemplated a substantial capital investment (approximately $15,000) in the Saluda application, but neither had assets of much substance at the time they made these plans. Wyndham had only begun his law practice about one year prior to the time he entered the planning of the Saluda application, and he had short-term and long-term notes totaling about $10,000, in addition to a mortgage, as of a few months after the application for Saluda was filed. Furthermore, Wyndham did not explain or establish that his income was sufficient to absorb substantial personal losses of approximately $5,000 incurred in prosecution of the SBC application. Warren had savings of no more than $1,500 plus one-half interest in a house of undetermined value. Either Wyndham and Warren did not, in fact, contemplate carrying through with the application, or they anticipated financial aid from other sources, or they approached the entire matter naively and foolishly. The facts of record in this case lead to the latter conclusion.

24. In an affidavit filed with a pleading responsive to United's Petition to Enlarge Issues to include a strike issue against SBC, Wyndham stated that Saluda had been chosen as the location for the SBC application because it was a growing community able to support a station. After a strike issue was added to the SBC-United proceeding, SBC requested dismissal of its application and stated that Saluda had not shown population growth over recent years and was not large enough to enable SBC to recoup its investment in its application. This circumstance is plausible and inconclusive as to any showing of bad faith.

25. The Saluda application was conceived in, or before, April 1966. The activities of the Saluda principals in respect to a frequency search in April 1966 corroborate this fact. The facts that SBC was not incorporated until October 31, 1966, and an equipment proposal from Gates Radio Company was obtained October 31, 1966; that a bank loan commitment for SBC was dated November 10, 1966; that the transmitter site agreement for SBC was dated November 16, 1966; and that the SBC application was filed on November 16, 1966, do not denigrate the conclusion as to the date when the application was conceived. Though the formal SBC application may have been hastily thrown together and filed after the filing of the United application, this circumstance

no more reflects bad faith than an honest effort by the naive principals to attain a competitive comparative status.

26. For its engineering counsel, the principals of the Saluda application hired two men—both of whom had done engineering work for WGSW. This fact may follow logically from the fact that Warren was the chief engineer of WGSW, or it may be a circumstantial link connecting WGSW and the SBC application. SBC and WGSW did not have the same legal counsel. It was Warren who did all of the contacting regarding frequency searches by the two consulting engineers. Indeed, he made the contacts from the offices of WGSW and informed one engineer to call him there collect in 1966. Correspondence from one of the engineers was addressed to him at WGSW. However, absent proof of overt knowledge and *participation* therein by Cook, these circumstances are not enough to charge WGSW with a strike application.

27. It is self evident that economic and competitive benefits would have accured to Cook and WGSW if the SBC application were granted rather than the United application. While a Saluda station would put a signal into Greenwood, it would still not be a local station for Greenwood. Moreover, it would be preferable to be competing with a station 30 miles from Greenwood, operated by individuals with no broadcast experience, than to be competing in Greenwood with a station operated by experienced broadcasters.

28. Both Wyndham and Warren testified that each of them considered Wyndham to be the moving force in the Saluda application. Wyndham exaggerated his relationship with Featherstone. Virtually all of Wyndham's decisions were based on the advice of Warren.

29. While Warren appears to have cooperated with his former employers—Radio Greenwood and Cook—to some extent in respect to his participation in the hearing in this case (i.e., Warren traveled to and from Washington for his first day of testimony with Cook, and, at the suggestion of Radio Greenwood's counsel, Warren came to Washington in advance of his appearance as a witness in order to look over the transcripts of this proceeding), it must be noted that, in so doing, he was acting primarily in his own interest to facilitate his preparation for appearance as a subpoenaed witness.

30. Putting the facts of this case in their best light (i.e., in a posture most favorable to Cook), it is concluded that Warren and Wyndham, independently of Cook, or any other Radio Greenwood principal, conceived a *bona fide* intention and plan to establish a broadcast facility in Saluda in late 1965 or early 1966, and they undertook the actions detailed in this decision to further that plan. The inception and execution of that plan contemporaneously with the activities of United in formulating and implementing its plan to put a station in Greenwood was purely coincidental.

31. Cook, having learned of United's intention and activities, as well as those of Warren and Wyndham, in the spring of 1966, determined to capitalize on the situation and to use the activities of Warren and Wyndham as a lever to discourage United in the consummation of its planning. Presumably, Warren and Wyndham did not know that they were being used in that fashion.

32. Cook clearly and avowedly evidenced his desire and intent to use the Saluda applicant's activities to his own advantage, in an effort to block United, by his statements to Crosland in August 1966, and by his statements to Mullinax and Davenport on September 12, 1966.

33. One may very well wonder why Cook would apparently be so naive or crass as to announce to Mullinax and Davenport his intention and desire to block their application. The answer rests upon the logical conclusion that Cook believed (1) that he could successfully deny having made such statements to Davenport and Mullinax, and (2) that he would either succeed in scaring United out of the picture or, if his bluff did not work, Warren and Wyndham would abandon their proposal because of the obvious economic burden which would have to be undertaken if they filed and went into a comparative hearing. Cook obviously knew that Barksdale (a man with money) was off in the wings as a putative investor for Saluda, and he used that knowledge, too, in his dealings with United. But, privately, he evidently did not seriously think that Barksdale would come into the picture, particularly if a comparative hearing were required.

34. Cook played the game to the point where, United having filed in September 1966, he expected Warren and Wyndham to quit. When it became evident that Warren and Wyndham were going to file nonetheless, Cook realized that Radio Greenwood might encounter trouble. He then consulted Woodall and, at the latter's suggestion, consulted his communications counsel. As a result of that consultation, he presented Warren with the alternative of leaving his employment with Radio Greenwood or prosecuting the Saluda application. Warren elected the former option, withdrew from Saluda as a principal, and was replaced by Barksdale.

35. There now arises the question whether, in the circumstances related above, Cook engaged in activities which meet the criteria for determination as to *participation* in a strike application.

36. The criteria relating to strike applications set out in paragraph 4 of the Commission's Designation Order in this proceeding are germane only to a determination as to whether a particular application is a strike application under conditions where its *bona fides* must be tested against *circumstantial* criteria because there is no openly *announced intent* by the applicant that the application is a strike application. In this case, the criteria are neither applicable nor pertinent. *Cook publicly avowed that his interest in the application was in the context of a strike application.*

37. Upon the conclusions set forth, the Saluda application is presumed to have been prepared and filed as a *bona fide* application *by the principals of SBC*. Contemporaneously, it is demonstrated that Cook embraced this application as a vehicle to launch an effort to block United. He clearly so stated. Because he encouraged Warren and Wyndham to bring them to the threshold of filing such an application, motivated by a desire to block United, it is clear that *he used the SBC transaction as his own strike vehicle, entirely independent of the actions or motivations of the SBC principals.* It is the conclusion of the Hearing Examiner that Cook's actions were sufficient, as a matter of law, to make Cook's activities fall within the prohibition relating to strike applications.

109-029—73——10

38. Now we come to the question as to what action Cook should have taken, in the circumstances, if he really desired not to actively and overtly foster the SBC application as a strike vehicle. In paragraph 31 of the findings, it is noted that Cook acknowledged that a station in Saluda might afford his station potential competition, but that he claimed that he was unable to do anything about it because he could not prevent Warren from filing. Yet, when the chips came down after September 12, 1966 (when it became clear that Warren and Wyndham intended to file), Cook gave Warren the ultimatum about leaving the employ of WGSW or prosecuting the application. It is evident, therefore, that the very least that Cook should have done, and could have done, was to present Warren with this alternative much earlier in the game, i.e., as soon as he became aware of the potential conflict between Saluda and United early in 1966. While this might not have resulted in preventing the filing of an application by SBC, it would have clearly demonstrated Cook's good faith in the situation and would have comported with *his* denial of participation in a strike situation. His failure to take this action, coupled with his public utterances concerning his motives and intent in respect to the Saluda applicant's activities, is sufficient to fix upon him the responsibility for encouraging and fostering what was, *for him*, a strike application.

39. A further word is appropriate concerning Cook's testimony on the matters where the issue of credibility has been decided adversely against him. It follows, from these conclusions, that Cook seriously and substantially perjured himself in respect to material matters testified to in this proceeding. His character is not in issue in this proceeding. Therefore, it may be that there is no action which the Commission can take in respect thereto in any final order flowing from the resolution of *this proceeding*. It is recommended that the Commission consider what other action may be appropriate in this connection within its jurisdiction, as well as the advisability of referral of this matter to the Department of Justice for its appropriate action.[28]

40. Thus, it is found and concluded that Cook, a principal in the ownership and operation of WGSW, owned and operated by Radio Greenwood, supported and otherwise participated in the preparation and filing of the application of Saluda Broadcasting Company, Inc. (as set forth *supra*) for a new radio station at Saluda, South Carolina (File No. BP–17529, Docket No. 18504) for the purpose of impeding or obstructing grant of the application of United Community Enterprises, Inc., for a new radio station at Greenwood, South Carolina (File No. BP–17439, Docket No. 18503).

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[28] This perjury by Cook, standing alone, should suffice to justify a denial of the renewal of license for Station WGSW. The importance of candid and truthful relationships between applicants and licensees, on the one hand, and the Commission, on the other, need not be labored here. Indeed, it is fundamental that "[t]he fact of concealment [or false statement] may be more significant than the facts concealed [or the substance of the false statement]." *WOKO, Inc.*, 329 U.S. 223, at p. 227.

It is urged by the Examiner that the Commission adopt a policy reflecting the fact that, as a matter of law, there is, in every case, an implicit character issue for consideration in respect to the truth and veracity of the testimony of every witness who is a principal, or a person under the control of a principal, of an applicant or licensee, in a hearing case. This character issue is to be distinguished from one which might arise in respect to consideration of *other* facts developed in a hearing which may have a bearing on character and as to which it is necessary to inject a specific issue in order to apprise the affected party as to what issue he must meet in the hearing.

In short, the matter of the veracity of *testimony* at the hearing is *always* an *implicit* issue which every witness must be inherently aware of.

41. Consequently, it is further found and concluded that a grant of the renewal of license application of Radio Greenwood, Inc. for Station WGSW, Greenwood, South Carolina, would not serve the public interest, convenience and necessity, and such application should be denied.

Accordingly, IT IS ORDERED that, unless an appeal to the Commission from this Initial Decision is taken by a party, or the Commission reviews the Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Rules, the applications of Grenco, Inc. (File Nos. BR–1137 and BRH–1674) ARE GRANTED; and the application of Radio Greenwood, Inc. (File No. BR–2821) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
ARTHUR A. GLADSTONE,
Chief Hearing Examiner.

F.C.C. 73R-76

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
CHARLES W. HOLT, TALLAHASSEE, FLA.	Docket No. 19445 File No. BP-18189
TALQUIN BROADCASTING CO., QUINCY, FLA.	Docket No. 19446 File No. BP-18464
B. F. J. TIMM, TALLAHASSEE, FLA. For Construction Permits	Docket No. 19447 File No. BP-18487

MEMORANDUM OPINION AND ORDER

(Adopted February 15, 1973; Released February 22, 1973)

BY THE REVIEW BOARD: BOARD MEMBER PINCOCK DISSENTING. BOARD MEMBER NELSON NOT PARTICIPATING.

1. Before the Review Board are two appeals from adverse rulings, filed November 27 and November 29, 1972, respectively, by B. F. J. Timm (Timm).[1] In the appeals, Timm seeks reversal of the Judge's denials of Timm's requests for permission to adduce evidence of the past broadcast record of competing applicant Charles W. Holt (Holt) in the operation of Station WHSY-FM, Hattiesburg, Mississippi,[2] and of Timm's past broadcast record in the operation of FM Station WGLF, Tallahassee, Florida.[3]

2. The Review Board will grant the appeal relating to WHSY-FM's unusually bad past broadcast record, but will deny the appeal relating to WGLF-FM's unusually good past broadcast record. Well established Commission policy requires that rulings of an Administrative Law Judge essentially interlocutory in nature not be reviewed by the Commission or the Review Board except when there is a manifest abuse of discretion or clearly unauthorized action. *Bay Broadcasting Co.*, 10 FCC 2d 331, 11 RR 2d 429 (1967); and *Image Radio, Inc.*, 13 FCC 2d 59, 13 RR 2d 205 (1968). Nevertheless, the Board is of

[1] Also before the Board are the following related pleadings: (a) oppositions, filed December 7 and December 11, 1972, by Holt; (b) Broadcast Bureau's comments, filed December 7, 1972; (c) replies, filed December 11 and December 14, 1972, by Timm; and (d) petition for late acceptance of appeals, filed December 11, 1972, by Timm. On November 9, 1972, the Presiding Judge granted Timm 20 days within which to file the instant and another pending appeal, due to time difficulties in obtaining transcripts. Although Commission Rule 1.301(c)(2) requires that such appeals be filed within five days after they are allowed, the Board will grant petitioner's request for late acceptance since the appeals were consistent with the agreement on the hearing record, no party objected at the time of the ruling, and no prejudice will result to any of the parties from acceptance of the appeals.

[2] Charles W. Holt, in addition to being an applicant in the present proceeding, is also president, general manager and 51% stockholder in Hub City Broadcasting Co., Inc., licensee of radio Stations WHSY-AM and FM, Hattiesburg, Mississippi.

[3] Timm, in addition to being an applicant in the present proceeding, is also president and 100% stockholder of Tallahassee Broadcasting Company, licensee of Station WGLF-FM, Tallahassee, Florida.

the view that Timm has clearly made the requisite threshold showing of "unusually poor" past broadcast record with regard to WHSY–FM,[4] and therefore the Judge's ruling must be overturned. Appellant relies on WHSY–FM's 1970 renewal application, which reveals that, in 83 composite weekly hours of operation, WHSY–FM devoted no time whatever to news, public affairs and "all other programs exclusive of entertainment and sports." Holt's only explanation for these percentages is his assertion that WHSY is part of an AM–FM operation and "efforts toward non-duplication had been in progress." However, precisely why efforts toward non-duplication should result in these percentages is unclear and the explanation does not, therefore, negate the inference that the zero percentages in the public service categories represent a deficiency in the station's obligation to meet the public's needs and interests.[5] As to Timm's own past broadcast record in the operation of WGLF–FM, however, the Board does not believe the Presiding Judge's ruling represents an abuse of discretion. Timm's showing does indicate the nature and diversity of its public affairs programming, but it also shows that only 45 minutes of WGLF's programming during the 1970–71 composite week was devoted to public affairs, or only 0.45% of the program time. Timm also concedes that WGLF has no news department whatever.[6] Under these circumstances, we do not regard the Judge's refusal to allow evidence of Timm's past broadcast record as an abuse of discretion, and, consequently, the Board will deny Timm's appeal.

3. Accordingly, IT IS ORDERED, That the petition for late acceptance of appeals, filed December 11, 1972, by B. F. J. Timm IS GRANTED, and the appeals ARE ACCEPTED; that the appeal from adverse ruling, filed November 27, 1972, by B. F. J. Timm IS GRANTED; and that the appeal from adverse ruling, filed November 29, 1972, by B. F. J. Timm IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[4] See *Policy Statement on Comparative Broadcast Hearings,* 1 FCC 2d 393, 5 RR 2d 1901 (1965).

[5] Holt also contends that the only method for introducing such evidence is by a petition to enlarge the issues and that, since its 1970 renewal application was granted, the matter need not be reopened. Both contentions are in error. The Board has expressly held that no special issue is required in order to adduce evidence on past broadcast record under the comparative issue. See *East St. Louis Broadcasting Co., Inc.,* 9 FCC 2d 212, 10 RR 2d 859 (1967); and *Pleasant Broadcasting Co.,* 19 FCC 2d 964, 17 RR 2d 465 (1969). And, since no comparative evaluation is involved in a grant of a renewal application, we do not regard the renewal of WHSY–FM's license as a bar to the comparative inquiry being authorized herein.

[6] Appellant cites *Mid-Florida Television Corp.,* 33 FCC 2d 1, 23 RR 2d 521 (1972), for the proposition that the Board does not find fault with an "otherwise superior record for the failure of a radio station to make news its thing." However, in *Mid-Florida* the Board indicated only that failure to specify in a renewal application what employees were engaged in news operations did not detract from an "unusually good' record. Moreover, the Board acknowledged that the station "must have employed someone in a news capacity." Thus, the Board believes *Mid-Florida* to be inapposite to the present proceeding.

F.C.C. 73-144

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of ITT WORLD COMMUNICATIONS INC. Petition Under Section 201(a) of the Communications Act of 1934 for Connection With RCA Global Communications, Inc. To Enable ITT To Provide Telex and Message Telegraph Services With Guam	Docket No. 19684

MEMORANDUM OPINION AND ORDER

(Adopted February 7, 1973; Released February 20, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT; COMMISSIONER H. REX LEE ABSENT.

1. The Commission has before it:

a. A petition filed by ITT World Communications Inc. (ITTWC) on March 29, 1972, requesting that the Commission, pursuant to Section 201(a) of the Communications Act of 1934, direct RCA Global Communications, Inc. (RCAGC) to cooperate with ITTWC in (i) establishing an electrical interconnection between RCAGC's telegraph message and telex systems on Guam and ITTWC's telegraph message and telex systems, (ii) establishing through routes and charges applicable thereto and the division of such charges, and (iii) establishing and providing facilities and regulations for operating such through routes;

b. A petition, filed by RCAGC on May 10, 1972, to dismiss or deny the petition for interconnection; and

c. A reply, filed by ITTWC on May 31, 1972, to the petition to dismiss or deny.

2. Presently, RCAGC has exclusive authority to provide telex and telegraph message services at Guam. Prior to October 1964, RCAGC was the only carrier equipped and authorized to provide any communications services between Guam and overseas points. By Memorandum Opinion, Order and Certificate adopted October 21, 1964, FCC 64-943 (File No. T-C-1791), the Commission authorized ITTWC to provide at Guam leased circuits for alternate and simultaneous voice and non-voice use by defense agencies of the United States government and leased circuits for alternate voice-record use by other customers. We were unable, however, to find then that the public interest would be served by permitting an additional record

carrier to compete with RCAGC at Guam in providing telegraph message, telex, and leased channel telegraph services.

3. In July 1967, ITTWC again applied for authority to provide all types of record telegraph services at Guam.[1] By Memorandum Opinion and Order adopted February 25, 1970, 21 FCC 2d 589 (File No. T–C–1791–7), we found that, in view of then current conditions, the public interest would be served by amending former limitations on ITTWC (as well as on Western Union International, another international record carrier) to permit competition in leased telegraph channel services on Guam, but we were unable to make such a finding with respect to message telegraph and telex.

4. In its present petition, ITTWC alleges that, in view of RCAGC's refusal to a midpoint interconnection with ITTWC's telex services offered in the Continental United States, Hawaii, Puerto Rico and the Virgin Islands, its own telex subscribers are unable to directly communicate with those of RCAGC at Guam. ITTWC recognizes that its subscribers could communicate with Guam were they to subscribe to the RCAGC telex system or, with respect to the Mainland, the Western Union Telegraph Company's (WUT) Telex or TWX systems through which a connection with the RCAGC telex system could be made.

5. However, ITTWC asserts, it has about 2000 telex subscribers in New York City who do not also subscribe to the RCAGC system. Moreover, if they were to subscribe to WUT's domestic system they would be dependent on a less efficient routing than if they were able to reach Guam directly via ITTWC. ITTWC states that the situation is particularly acute at Hawaii where it has 213 exclusive telex subscribers who have no telex access to Guam. This is considered by ITTWC to be significant in view of Guam's growth and the expansion of Honolulu firms to Guam.

6. According to ITTWC, the inability of its customers to reach Guam has inhibited it in competing for new subscribers, is causing losses in existing subscribers, and may affect its ability to attract users of leased channel services with Guam. In addition, ITTWC points out, it is unable to compete for the transit handling of telex traffic between Guam and points other than the Mainland and Hawaii. Insofar as telegraph message traffic is concerned, ITTWC believes that the lack of interconnection with RCAGC at Guam has relegated it to the role of a domestic carrier, since it must exchange such messages with RCAGC for overseas transmission. ITTWC proposes that interconnection initially involve three 50-band circuits, one for message use and two for telex use.

7. ITTWC stresses that it does not seek to disturb the status quo or to establish new facilities and offer additional services on Guam. It is endeavoring to extend communications services that it offers in Hawaii, San Francisco, New York, Washington, D.C., Puerto Rico and the Virgin Islands to include telegraph message and telex to and from Guam and thus achieve an equal footing with RCAGC in competing to meet the communications needs on Guam. A normal partner-

[1] In 1965, the Telegraph Committee had denied a request of ITTWC to provide leased channel telegraph service at Guam. FCC 65 M–1484 (File No. T–C–1791, 1965).

ship arrangement (similar to the many both ITTWC and RCAGC have with foreign entities), where operations are on a direct circuit basis and where each entity provides channel facilities to the theoretical midpoint, would satisfy that objective.

8. In its opposition to the ITTWC petition, RCAGC argues that ITTWC has failed to demonstrate that there has been any significant change in circumstances since our former decisions in the matter. According to RCAGC, ITTWC has not shown that its proposal is economically feasible or that RCAGC's current telex and telegraph message operations at Guam are inadequate.

9. Regarding the inability of some ITTWC subscribers to reach Guam, RCAGC asserts that this fact was well known to the Commission at the time of its earlier decisions and presumably was taken into consideration. In addition, RCAGC argues that the loss of customers due to the limitation placed on ITTWC's operations is unlikely since only about 10% of telex customers do not also subscribe to the telex service of another carrier.

10. RCAGC concludes that the real objective of ITTWC in the instant petition is to divide the Telex business at Guam. Such a division, according to RCAGC, would render its Guam telex and telegraph message services, now operating at a loss, more unprofitable and ultimately degraded. While RCAGC agrees that there is evidence of an increase in telex traffic at Guam, it claims that its investments and costs in providing telex and telegraph message services have also risen.

Discussion

11. We think that the points raised by ITTWC have sufficient merit to warrant an investigation and shall therefore, pursuant to Section 201(a) of the Communications Act of 1934, order a hearing into the matter. While it is true that heretofore we have not been able to make a public interest finding enabling ITTWC to operate its telex and message services at Guam, the issue now before us is whether RCAGC, as the sole carrier authorized to provide such services at Guam, should interconnect with ITTWC telex and message services offered at other points rather than connecting only with its own telex and message services at such points and so maintain a virtual monopoly position with respect to transmission of telex traffic and message traffic between Guam and other United States points. There is nothing in our previous orders on the matter that furnishes a basis for concluding that we have already determined this latter point in RCAGC's favor. Our previous remarks with respect to feasibility of competition at Guam were directed to operations only at Guam, not to total operations between Guam and other points in RCAGC's system.

12. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 201(a) and 403 of the Communications Act of 1934, that an investigation is hereby instituted into establishing an interconnection between RCAGC's telegraph message and telex system on Guam and ITTWC's telegraph message and telex system.

13. IT IS FURTHER ORDERED, that without in any way limiting the scope of the proceeding, it shall include inquiry into the following matters:

(1) Whether it is necessary or desirable in the public interest to require RCAGC to interconnect its telegraph message and telex facilities with facilities of ITTWC for the provision of service to and from Guam:

(a) The effect, financial and other, on ITTWC and RCAGC telex and message services, and the public, were no interconnection to be established; and

(b) the manner in which ITTWC customers are able to send or receive messages to and from Guam in the absence of interconnection.

(2) The point at which interconnection, if any, should be established, and the financial and other effects on the ITTWC and RCAGC telex and message services and the public:

(a) The through routes and charges to be established;

(b) the facilities and regulations appropriate to the operation of such routes;

(c) the charges and the classifications, regulations, and practices affecting such charges; and

(d) the appropriate division of such charges.

14. IT IS FURTHER ORDERED, that a hearing shall be held in the proceeding at the Commission's offices at Washington, D.C. at a time to be specified in a subsequent order and that the Administrative Law Judge designated to preside at the hearing shall certify the record to the Commission without preparing either a recommended or initial decision and that the Chief, Common Carrier Bureau shall prepare and issue a recommended decision which shall be subject to the submittal of exceptions and request for oral argument as provided in 47 C. F. R. Section 1.276 and 1.277, after which the Commission shall issue its decision as provided in 47 C. F. R., Section 1.282.

15. IT IS FURTHER ORDERED, that ITTWC and RCAGC are hereby made parties respondent to the proceeding.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73–165

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of MEREDITH COLON JOHNSTON (WECP), CARTHAGE, MISS. AARON L. FORD AND GERTRUDE C. FORD, D.B.A. FORD BROADCASTING CO., JACKSON, MISS. For Construction Permits	Docket No. 18487 File No. BP–17449 Docket No. 18488 File No. BP–17752

APPEARANCES

Russell Rowell (Fletcher, Heald, Rowell, Kenehan, and Hildreth) on behalf of Ford Broadcasting Company; *Robert A. Woods* (Schwartz and Woods) on behalf of Meredith Colon Johnston (WECP); and *William D. Silva* on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted February 14, 1973; Released February 21, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON NOT PARTICIPATING; COMMISSIONER REID ABSENT.

1. This case involves the mutually exclusive applications of Meredith Colon Johnston (Johnston) and of Aaron L. Ford and Gertrude C. Ford, d/b as the Ford Broadcasting Company (Ford). Johnston seeks a construction permit to change the existing facilities of standard broadcast station WECP, Carthage, Mississippi, from 1480 kHz, 500 watts, Day to 1080 kHz, 250 watts, Day, Class II–D; while Ford has applied for a construction permit for a new Class II–D standard broadcast station on 1080 kHz, 10 kw, DA–Day at Jackson, Mississippi. Following hearings the Administrative Law Judge granted Johnston's application and denied that of Ford. 33 FCC 2d 345 (1970). The Review Board affirmed this decision. For a complete history of the proceeding as well as a recitation of the issues in the case, see the Review Board's Decision at 33 FCC 2d 324 (1972).

2. Following Ford's filing of an application for review of the Review Board's Decision, we granted review and ordered oral argument in the proceeding to be held on January 22, 1973. FCC 72–1119, released December 18, 1972. We have carefully considered the record evidence in this proceeding, as well as the pleadings submitted to the Commission and counsels' contentions advanced at oral argument. This has been a strenuously contested proceeding, and the record is replete with conflicting evidence on each of the contested issues. How-

ever, both the Administrative Law Judge and the Review Board determined that a grant of Johnston's application would better serve the public interest. On the basis of our review of this case, we are persuaded that the Review Board's findings adequately and properly reflect the record and that its conclusions and ultimate disposition of the applications under consideration are correct. For the reasons set forth in the Board's decision, which we adopt as our own, we shall therefore grant the application of Johnston and deny that of Ford.

3. Accordingly, IT IS ORDERED, That the Decision of the Review Board, 33 FCC 2d 324, IS AFFIRMED; that the application of Meredith Colon Johnston (WECP) for a construction permit to change the existing facilities of standard broadcast station WECP, Carthage, Mississippi, from 1480 kHz, 500 watts, Day, to 1080 kHz, 250 watts, Day, Class II–D, IS GRANTED; and that the application of Aaron L. Ford and Gertrude C. Ford, d/b as Ford Broadcasting Company for a construction permit for a new standard broadcast station on 1080 kHz, DA–Day, Class II–D, Jackson, Mississippi, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-190

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re: LVO CABLE, INC., PRYOR, OKLA. For Certificate of Compliance	CAC-1058 OK078

MEMORANDUM OPINION AND ORDER

(Adopted February 14, 1973; Released February 22, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING; COMMISSIONER H. REX LEE CONCURRING IN THE RESULT; COMMISSIONER REID ABSENT.

1. On August 23, 1972, LVO Cable, Inc., filed an application (CAC-1058) for certificate of compliance for a new cable television system to serve approximately 7,036 persons at Pryor, Oklahoma (outside all television markets).[1] The application proposes carriage of the following television signals: KFSA-TV (ABC, CBS, NBC) and KFPW-TV (Ind.), both Fort Smith, Arkansas; KGTO-TV (NBC), Fayetteville, Arkansas; KODE-TV (ABC) and KUHI-TV (CBS) both Joplin, Missouri; and KOAM-TV (NBC), Pittsburg, Kansas. This application is opposed by Leake TV, Inc., licensee of Station KTUL-TV, Tulsa, Oklahoma, and LVO has replied.

2. In its objection, Leake alleges: (a) that LVO's proposal to carry the six television signals requested on a composite basis (in the event the system does not have adequate channel capacity to carry all the stations full-time) is not permitted by Section 76.55(b);[2] (b) that composite carriage is inconsistent with the public interest because: (1) individual station identities may not be maintained; (2) there is no assurance that station and sponsorship identification information would be provided or that the system would not insert its own ads; (3) there is no assurance that fairness and political broadcasting balances maintained by individual stations would be maintained on the cable channels used for composite programming; and (4) there is no indication how the public is to be protected against biased presentations or misrepresentations; (c) that composite carriage may involve copyright infringement because program selection is more akin to program origination than the passive transmission of broadcast signals; (d) that

[1] On September 1, 1972, LVO Cable, Inc., under the name Gencoe, Inc., received a certificate of compliance for carriage of KTUL-TV (ABC), KTEW (NBC), KOTV (CBS), KOED-TV (Educ.), all Tulsa, Oklahoma; KTVT (Ind.), Fort Worth, Texas; KDTV (Ind.), Dallas, Texas; and KBMA-TV (Ind.), Kansas City, Missouri on its cable television system at Pryor, Oklahoma, until March 31, 1977.

[2] Section 76.55(b) of the Rules provides that:

"(b) Where a television broadcast signal is carried by a cable television system, pursuant to the rules in this subpart, the programs broadcast shall be carried in full, without deletion or alteration of any portion except as required by this part."

composite programming on a "Super TV Station or Stations" will create an unfair competitive advantage against the local Tulsa stations whose service areas include Pryor; and (e) that LVO's franchise is not in compliance with Section 76.31 of the Rules.

3. We rule on the objections as follows: (a) Broadcast TV signals that are required on request to be carried must be carried full time. But, where a cable system is located outside all television markets, our rules do not prohibit composite carriage of distant television signals. Section 76.55(b) specifically provides that where a television broadcast signal is carried, the programs broadcast shall be carried in full without deletion or alteration of any portion except as required. But this refers only to carriage of particular programs; [3] (b) (d) Leake has not supported these allegations, and we will reject the arguments as speculative; (c) we do not find this argument persuasive; moreover, this is not the forum in which a copyright argument is relevant; and (e) when the Pryor system was authorized, its franchise (granted February 17, 1970) was found to be in substantial compliance sufficient to warrant a grant until March 31, 1977. E.g. *CATV of Rockford, Inc.*, FCC 72–1005, 38 FCC 2d 10.

In view of the foregoing, the Commission finds that a grant of the above-captioned application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Objection to Certification" filed October 16, 1972, by Leake TV, Inc., IS DENIED.

IT IS FURTHER ORDERED, That LVO Cable, Inc.'s "Application For Certification" (CAC–1058) IS GRANTED and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[3] We note that Station KTUL–TV, which places a Grade A contour over Pryor, has the rights of mandatory carriage, upon request, and network program exclusivity, upon request, under Sections 76.57(a)(1) and 76.91 of the Commission's Rules, respectively.

F.C.C. 73R-87

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
MEDIA, INC., YOUNGSTOWN, OHIO	Docket No. 18768 File No. BP-17435
JUD, INC., ELLWOOD CITY, PA.	Docket No. 18769
For Construction Permits	File No. BP-17749

ORDER

(Adopted February 23, 1973; Released February 27, 1973)

BY THE REVIEW BOARD: NELSON, PINCOCK, AND KESSLER.

1. The Review Board having under consideration the petition for leave to amend to update application pursuant to Section 1.65 of the Rules, filed February 5, 1973, by Jud, Incorporated;

2. IT APPEARING, That no objections to acceptance of the amendments have been filed within the time allowed therefor;

3. IT IS ORDERED, That the above petition for leave to amend IS GRANTED and the amendment therein IS ACCEPTED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73R-80

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of OLYMPIAN BROADCASTING CORP. (WKIP), POUGHKEEPSIE, N.Y. For Construction Permit	Docket No. 19171 File No. BP-18122

APPEARANCES

Reed Miller, Jerome Lipper and *David H. Lloyd*, on behalf of Olympian Broadcasting Corp.; *Michael Finkelstein* and *Martin A. Blumenthal*, on behalf of WNAB, Inc.; *Louis Schwartz*, on behalf of Raritan Valley Broadcasting Company, Inc.; *Donald E. Bilger* and *Robert L. Olender*, on behalf of Masscom Broadcasting Corporation; and *Earl C. Walck, Katherine Savers McGovern* and *Robert B. Nelson*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted February 20, 1973; Released February 23, 1973)

BY THE REVIEW BOARD: BERKEMEYER, PINCOCK, AND KESSLER.

1. Olympian Broadcasting Corp. (WKIP), the applicant herein, seeks to modify its existing Class IV standard broadcast facility at Poughkeepsie, New York. WKIP now operates on 1450 kHz, 250 w, 1 kw–LS, DA–D, U, with a two-tower antenna system. The No. 1 tower is a 340 foot top-loaded tower now utilized with power of 250 watts and an effective radiated field of 270 mv/m, for WKIP's nighttime nondirectional operation. The No. 2 tower is a 160 foot guyed unit utilized only during daytime hours, in conjunction with its 340 foot top-loaded tower, to develop the required daytime directional radiation pattern, using 1 kw power. The present daytime antenna radiation is 275 mv/m to the north, 190 mv/m to the east, 75 mv/m to the south (from 140° to 210° True including directions toward co-channel Stations WNAB, Bridgeport, Connecticut, and WCTC, New Brunswick, New Jersey), 210 mv/m west, with 250 mv/m in the direction of WMAS, Springfield, Massachusetts. These antenna radiations produce an RMS field of 200 mv/m for 1,000 watts.

2. By its request for modification here, WKIP proposes (a) to dismantle its second tower which now provides for daytime directional operations, and (b) to operate nondirectionally daytime utilizing its 340 foot top-loaded tower, with its effective radiated field of 270 mv/m. In essence, therefore, the applicant here is seeking an improvement of WKIP's facilities whereby its daytime antenna efficiency is sub-

stantially improved, particularly in the southern direction where its effective radiated field is now 75 mv/m.[1]

3. By Memorandum Opinion and Order, FCC 71–24, released March 23, 1971, the Commission designated this application for hearing after reviewing the substance of the allegations of a petition to deny, filed by WNAB, Bridgeport, and the opposition and reply pleadings thereto. In its designation Order, the Commission also reviewed pertinent aspects of the historical background of WKIP's operation as well as WNAB's, and the interaction of their respective operations from an engineering standpoint. In this connection, the Commission noted that (a) WKIP's requested effective field of 270 mv/m/kw was in excess of the 150 mv/m/kw radiated by Station WKIP in late 1962 when it last operated with 250 watts daytime, and (b) in addition to changing from directional to nondirectional daytime, the applicant was simultaneously requesting an increase in effective field beyond that allowed under existing policy when a Class IV station increases daytime power. Accordingly, the Commission designated the application for hearing on three issues relating (a) to the areas and populations proposed to be gained, (b) to the extent of interference caused to three existing co-channel stations, and to the availability of other primary services, and (c) to the ultimate question of whether, in the light of the evidence adduced, a grant would serve the public interest.

4. Following the hearing on December 16, 1971, Administrative Law Judge Isadore A. Honig issued an Initial Decision [2] recommending a denial of WKIP's application. In reaching his conclusion, the Presiding Judge outlined part of the historical background relating to WKIP's operation, in para. 9 of his findings of fact, as well as para. 9 of his conclusions. The crux of his decision is set forth in para. 11 of the conclusions of the Initial Decision, and reads in pertinent part, as follows:

> The issues specified in this proceeding require a determination relative to the gain or loss of WKIP primary service as well as to the impact of the proposed operation on the operations of three existing stations. The long-established decisional test applied by the Commission to the facts ascertained under these issues where there is resulting objectionable interference is "whether the need for the proposed service outweighs the need for the service which will be lost by reason of such interference." The findings of fact show that the applicant's rural gain area receives from 17 to 27 aural services and that the urban gain area receives from 12 to 14. Two Poughkeepsie FM stations serve all of the gain area, both rural and urban portions, and AM station WEOK in Poughkeepsie serves at least 75% of the gain area, both rural and urban portions. Thus, the population in the gain area, approximately 73% of whom reside in Duchess County, now enjoy an abundance of radio service which includes FM service from 2 Poughkeepsie stations and AM service in at least 75% of the gain area from a Poughkeepsie station. Similarly, the populations in the areas of objectionable interference that would be suffered by Stations WMAS, WCTC and WNAB all receive a plentitude of service since at least 10, 12 and 15 AM services are available to them, respectively.

[1] See the chronology set forth in the attached appendix relating to our ruling on WKIP's exception No. 1, and to WKIP's original 1968 application seeking to modify the daytime directional antenna in a manner which would particularly increase the effective radiated field in the southern direction from 75 mv/m to 150 mv/m. Subsequently, as shown by the chronology, this application was amended to the instant proposal eliminating the daytime directional antenna which results in an antenna efficiency increase to 270 mv/m/kw.

[2] FCC 72D–21, issued March 22, 1972, and released March 23, 1972.

Based upon consideration of the number of services available to the proposed WKIP gain area and to the areas which would lose service, it is concluded that *the applicant has not made a persuasive showing of a preponderating need for service to such gain area.* (Emphasis supplied.)

5. Exceptions were filed by WKIP, challenging the Presiding Judge's interpretation and construction of the Commission's recitations in its designation Order, as well as his interpretation and construction of the Commission's Class IV power policy, and the ultimate resolution of the overall public interest issue. WKIP urges the Board (a) to reverse the Presiding Judge's rulings excluding from evidence portions of WKIP's exhibits which set forth the historical prior nexus of WKIP and WNAB, and of other co-channel stations, and (b) to grant the subject application.

6. Oral argument was held on January 23, 1973. We have reviewed the Initial Decision in light of WKIP's exceptions and oral argument, and our examination of the record. Except as modified in the rulings on exceptions in the attached appendix, we concur with the Presiding Judge's findings of fact and conclusions, and hereby adopt the Initial Decision. In this connection, it is to be noted, as shown by our ruling on WKIP's exception No. 1, that we have modified the Presiding Judge's findings of fact at para. 9 of his Initial Decision by additional findings to reflect the chronology of prior events relating to WKIP and WNAB. However, we cannot accord decisive weight to these additional findings. On the basis of the issues in this proceeding and the Commissison's present policy which requires that proposals to increase antenna efficiency stand or fall on their own merits where objectionable interference to existing stations will result, it is our view that (a) this case must be decided on the basis of present policy; (b) WKIP, although accorded an opportunity in this proceeding to meet the preponderant need test,[3] failed to do so; and (c) under these circumstances, the WKIP application must be denied. Moreover, we deem WKIP's representations relating to its 1963 amendment to change to a directional daytime operation to supersede all prior representations and proposals. For it is clear that, on the basis of WKIP's 1963 engineering statements, representations were made that the public interest would be served by a grant of the amended directional daytime proposal because (a) WKIP would be able to provide adequate *nighttime* coverage of its principal city *for the first time;* (b) the daytime directional would provide adequate protection to WKIP against the increased daytime interference resulting from recent grants of power increases to co-channel Stations WNAB, WMAS, and WCTC; and (c) the proposed directional daytime operation would result in a *reduction* of interference to two stations (WMAS and WNAB), and the *elimination* of interference to a third (WCTC), when compared with the WKIP 1 kw nondirectional operation authorized by the Commission in 1962. The Commission did, in fact, grant the daytime directional application on September 15, 1965. In doing so, it may reasonably be stated that the Commission relied upon these representations.

[3] See para. 4, *supra.*

100-029—73——11

7. Stated another way, it is our view, on the basis of WKIP's antecedent history which we have considered in light of its exceptions, that this history lends no support whatsoever to its position here that in 1963, when the Commission set aside the 1962 grant, in view of the Court of Appeal's decision in *Hudson Valley Broadcasting Corporation* v. *F.C.C.*, 320 F.2d 723 (D.C. Cir. 1963), the station was then "forced" to go directional. This simply is not so based upon the historical chronology set forth in our rulings on exception no. 1 in the attached appendix. The chronology shows that in 1963 when the Commission set aside the 1962 grant and designated the application for hearing, the Commission required WKIP to reduce only its antenna efficiency to 150 mv/m/kw pending the outcome of the hearing. In all other respects, the Commission's interim authorization, pending the outcome of the hearing, permitted WKIP to retain the substantial benefits of its 1962 grant, *viz*, continued operation at its new site, with its 340 foot top-loaded antenna, and with increased power of 1 kw. Hence, it is clear that at the particular moment in time in 1963 when WKIP amended its application, it retained substantial benefits from the 1962 grant. At that time, it also had the choice of proceeding to hearing on the issues specified which were not limited solely to the multiple ownership issue. Perhaps, it could have succeeded if it had continued to prosecute its 1962 application; instead, it chose to amend to provide for its present daytime directional operation on the basis of the public interest benefits already described at para. 6 above. It is also patently clear that with its present daytime directional, it has, similarly, retained substantial benefits of the 1962 grant. See para. 1, *supra*.

8. In sum, as shown by para. 6 above, one of the public interest benefits to be derived from its present daytime directional operation was the reduction of interference to several stations, including WNAB. Now, due to the acquisition of WKIP by new owners thereby eliminating the prior multiple ownership problem of the former owners with WGNY, Newburgh, New York, the new owners desire to obliterate this public interest benefit—without meeting the preponderant need test prescribed by the issues in this proceeding [4]—and on the basis of a contention that they, in effect, have a right to a return of the *status quo ante* of the 1962 grant. We disagree. Succinctly stated, we believe that (a) the new owners are bound by prior representations made with respect to the WKIP directional daytime proposal because it is undebatable that the new owners are charged with notice and knowledge of WKIP's antecedent history; and (b) it was incumbent upon them to meet the preponderant need test [5] in order to prevail in this proceeding.

9. Accordingly, IT IS ORDERED, That the application of Olympian Broadcasting Corp. (WKIP) (File No. BP–18122) for a construction permit to change its daytime operation to a non-directional operation and to increase its effective daytime antenna radiation to 270 mv/m, IS DENIED.

SYLVIA D. KESSLER,
Member, Review Board,
Federal Communications Commission.

[4] See para. 4, *supra*.
[5] See para. 4, *supra*.

APPENDIX

RULINGS ON EXCEPTIONS OF OLYMPIAN BROADCASTING CORP. (WKIP) TO EVIDENTIARY RULINGS

Exception No.	*Rulings*
1	Granted, to the extent that these exhibits (consisting of reproductions of construction permits, licenses and engineering statements in support of applications therefor for Class IV Stations WNAB, WCTC, WMAS and WKIP) are relevant to an understanding of the historical background in this proceeding. For this purpose, we have also taken official notice of the unreported Initial Decision of Administrative Law Judge Millard F. French (FCC 58D–40), released June 10, 1958, granting the application of WNAB for a construction permit to change its facilities, by moving the transmitter-antenna location, increasing the overall height to 344 feet, and increasing the antenna efficiency to 237 mv/m/kw. In the context of para. 9 of the findings of fact of the Initial Decision, these are additional findings relating to the chronology of events: 1958—WKIP and WNAB entered into an agreement in which they agreed to mutually accept increases in their respective antenna efficiencies. WKIP Exh. 5, p. 28. 1959—License was issued to cover WNAB CP grant. 1961—WKIP and WNAB entered into a further agreement in which they mutually agreed to power increases of 1 kw daytime. WKIP Exh. 5, p. 28. 1961—WKIP filed an application for a construction permit to improve its facilities by moving its transmitter site, increasing its antenna height by using a 340 foot top-loaded antenna, increasing its antenna efficiency to 270 mv/m, and increasing its daytime power from 250 watts to 1 kw. 1961—WNAB filed an application for increase of power daytime from 250 watts to 1 kw which was granted September 5, 1962. 1962—The Commission denied a petition to deny, filed by WEOK, Poughkeepsie, directed against a grant of the WKIP application on the grounds that its service area involved increased overlap with the service area of WGNY, Newburgh, New York, in contravention of the Commission's multiple ownership rule, and granted WKIP's application, without hearing, 24 RR 223 (1962), WKIP Exh. 6. At the same time, the Commission concurrently granted the WNAB application. 1963—Upon review of the WKIP grant, without hearing, the Court of Appeals in *Hudson Valley Broadcasting Corporation* v. *F.C.C.*, 320 F.2d 723 (1963), remanded the case to the Commission for further proceedings. WKIP Exh. 7. 1963—By Memorandum Opinion and Order, released July 23, 1963 (WKIP Exh. 5, p. 31), the Commission set aside its prior grant of WKIP's application, designated it for hearing, and authorized an interim operation during the pendency of the hearing which permitted WKIP to remain at its new site, with power of 250 w, 1 kw–LS, unlimited time, but with the antenna

Exception No.	*Rulings*
	radiation not to exceed 150 mv/m/kw. In this connection, the Commission stated: "If WKIP were required to operate with only 250 watts power during daytime hours, it would receive serious interference from co-channel Class IV stations that have recently increased daytime power. However, operation at reduced antenna efficiency, but with the increased power will permit WKIP to continue to serve essentially all the population served prior to the Class IV power increases. Accordingly, the Commission will permit continued operation of WKIP at the new site, but with the antenna efficiency not to exceed 150 mv/m/kw."
	1963—On September 6, 1963, WKIP filed an amendment to its 1962 application proposing a change in the daytime mode of operation to include a directional antenna system and the addition of a second tower. WKIP Exh. 5, pps. 35–49. In this connection, the engineering statement accompanying the amendment reads, in pertinent part, as follows: "WKIP has complied with the [Commission's] order to reduce efficiency by inserting a suitable resistor in series with the antenna. As a result of this interim authority, *WKIP is once again unable, during nighttime hours, to render primary service to all of the area within its principal city.* It is now proposed to reduce the WKIP signal in the direction of WGNY during daytime hours to the equivalent of the WKIP coverage from the former 250 watt roof top operation and thereby eliminate any increase in overlap of coverage between the two stations. * * * During daytime hours, WKIP would operate with a two tower directional system to restrict signal toward WGNY. * * * The proposed daytime directional system, while not providing the optimum coverage gains available from the originally proposed 1000 watt nondirectional operation authorized in September 1962, will, nevertheless, provide adequate protection to WKIP against the increased daytime interference resulting from recent grants. * * * At the same time, WKIP will be enabled to improve its overall service in the Poughkeepsie area, both day and night and, *for the first time, to provide adequate night coverage of its principal city.* * * * The proposed directional daytime operation would not cause any new interference. * * * It would result in a *reduction* of interference to two stations (WMAS and WNAB) and the *elimination* of interference to a third (WCTC), when compared with the WKIP 1 kw. nondirectional operation authorized by the Commission in September 1962." (Emphasis supplied.) See WKIP Exh. 5, pps. 36–38.
	1963—By Memorandum Opinion and Order, released September 23, 1963, the Administrative Law Judge accepted the amendment, removed the application, as amended, from hearing, returned it to the processing line, and terminated the hearing. WKIP Exh. 5, p. 50.

Exception No.	*Rulings*
	1965—On September 15, 1965, the Commission granted the WKIP application for a daytime directional operation, using 1 kw power, and for nondirectional nighttime operation, using 250 watts power, and an antenna efficiency of 270 mv/m.
	1967[1]—Star Broadcasting Corporation acquired the license of WKIP, pursuant to Commission consent (File No. BAL–6196) on December 22, 1967.
	1968—On March 8, 1968, Star Broadcasting Corp. filed an application to modify WKIP's daytime directional operation, in a manner which would particularly increase the effective radiation field in the southern direction from 75 mv/m to 150 mv/m.
	1969—WNAB filed a petition to deny the Star 1968 application.
	1969—Star filed an amendment to its application to modify its daytime facilities, stating that since the question of duopoly overlap no longer obtains, Star, by the instant amendment, proposes to resume nondirectional daytime operation with power of 1 kw, as originally authorized by the Commission on September 5, 1962. This is the proposal involved in the subject proceeding.
	1969—WNAB filed a supplement to its petition to deny.
	1970—By Commission consent (File No. BTC–6253; BAL–7130), Olympian Broadcasting Corp. acquired the license of WKIP from Star Broadcasting Corp., effective November 5, 1970.
	1970—Star's application amended in order to reflect the assignment of the license of WKIP to Olympian.
	1971—By Memorandum Opinion and Order (FCC 71–248), released March 23, 1971, the Commission designated the 1968 application, as amended, for hearing.
2	Granted. The availability of services in the interference area under common ownership with WNAB is relevant to a determination of the significance of the interference.
3	Denied, since no party to this proceeding requested the addition of an issue regarding specialized local programming. *WMAX, Inc.*, 29 FCC 706, 19 RR 1086a (1960), *reconsideration denied*, 30 FCC 104, 19 RR 1091 (1961); *Mid-America Broadcasting System, Inc.*, 19 RR 889 (1960); *Eastside Broadcasting Co.*, 37 FCC 625, 3 RR 2d 505 (1964).
	OLYMPIAN'S EXCEPTIONS TO FINDINGS
4	Granted, to the extent indicated in paras. 1 and 2 of the Board's decision. *Denied* in other respects because the requested finding obscures the facts.
5	Granted, see ruling on exception no. 1, *supra*.
6, 7	Denied, as irrelevant to the issues and the ultimate determination to be made. Exception requests a finding that would only be pertinent to a Class IV power increase, whereas the application here is for an in-

[1] The Board has officially noticed the filings which followed the 1965 directional authorization.

Exception No.	*Rulings*
	crease in antenna efficiency. See ruling on exception no. 10, *infra*. (NOTE: Even if granted, these exceptions would be of little significance in view of the finding of minimal interference to WCTC and WMAS in paras. 6 and 7 of the conclusions in the Initial Decision. In addition, if the same 250 watt test requested by exceptor, Olympian, were applied to WNAB, which Olympian does not urge, WKIP would cause objectionable interference. See Rules 73.37(c) and 73.24 (b)(2).)
	OLYMPIAN'S EXCEPTIONS TO CONCLUSIONS
8	Denied. See rulings on exception Nos. 6 and 7, *supra*.
9	Denied. The elimination of the use of one tower not only results in an omnidirectional mode of daytime operation, but also results in an improved antenna efficiency toward those areas currently protected by the directional array. See paras. 1 and 2 of the Board's decision.
10	Denied. First, the instant proposal is not an application for a Class IV station power increase. It is an application to change the antenna system from a directional to a nondirectional array the effect of which is to increase the antenna efficiency in pertinent directions. See paras. 1 and 2 of the Board's decision. In both *Radio Station KAYE*, 37 FCC 242 (Rev. Bd. 1964), and *Moberly Broadcasting Co. (KWIX)*, 37 FCC 1049 (Rev. Bd. 1964), which involved applications for increase in antenna height of existing Class IV stations, the Commission found that the Class IV power increase policy was not pertinent. Rather, such applications "must stand or fall on their own merits under the presently applicable rules and policies * * *"
11	Denied. The Presiding Judge's conclusion is clearly supported by findings of the abundance of available services to the interference areas, the substantial loss of service to WNAB, and the failure of the applicant to seek enlargement of issues to include a determination of special need for the applicant's service which thereby precluded such a showing.
12	Denied for the same reasons given in the ruling to exception No. 11.
13	Denied. The exception is not supported by the record. See ruling on exception No. 1, which establishes that WNAB was authorized to improve its antenna efficiency in 1958.
14	Denied. The exception brushes over a distinction that must be made. The Commission does not have a policy favoring improvements in antenna efficiency of Class IV stations on a uniform basis; its policy supports uniform increases in power for that class. Further, the Commission has determined that "in the absence of a showing that objectionable interference would not result, the normal benefits which would accrue from power increases to 1 kilowatt would not be achieved unless the power increases were accomplished *without* any increase in antenna efficiency." (Emphasis supplied.) *Olympian Broadcasting Corp. (WKIP)*, 28 FCC 2d 399, 401 n.6 (1971). See *Moberly Broadcasting Co. (KWIX)*, 37 FCC 1049, 1053 (Rev. Bd. 1964). Also, see ruling on exception No. 10.

Exception No.	*Rulings*
15	Granted in part, *denied* in part. Improvements in antenna efficiency must stand or fall on their own merits. Where interference is involved, as here by WKIP causing objectionable interference to WNAB, Commission policy and rules require such proposal to meet the preponderant need test, as considered by the Presiding Judge in paras. 11–13 of his Initial Decision. Also, see our ruling on exception No. 14 and the cases cited therein.
16	Denied. See ruling on exception Nos. 10 and 14. The Board fully agrees with the Presiding Judge's determination that *North Shore Broadcasting Corp.* (*WESX*), 8 FCC 2d 741 (1967) and *North Shore Broadcasting Corp.* (*WESX*), 12 FCC 2d 687, 12 RR 2d 1256 (1968), are inapposite, and agrees with the reasons stated therefor.
17	Denied. The Presiding Judge's conclusion that a grant would not be in the public interest is clearly supported by Olympian's failure to meet the test under Rule 73.24(b)(2) and by its failure to establish that Commission regulations, policy or precedent justify a grant.
18	Denied, for the reasons stated in the Initial Decision, the Board's decision, and our rulings on WKIP's exceptions here.

F.C.C. 72D-21

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of OLYMPIAN BROADCASTING CORP. (WKIP), POUGHKEEPSIE, N.Y. For Construction Permit	Docket No. 19171 File No. BP-18122

APPEARANCES

Jerome Lipper and *David H. Lloyd*, on behalf of Olympian Broadcasting Corp.; *Michael Finkelstein* and *Martin A. Blumenthal*, on behalf of WNAB, Inc.; *Louis Schwartz*, on behalf of Raritan Valley Broadcasting Company, Inc.; *Donald E. Bilger* and *Robert L. Olender*, on behalf of Masscom Broadcasting Corporation; and *Earl C. Walck* and *Katherine Savers McGovern*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER ISADORE A. HONIG

(Issued March 22, 1972; Released March 23, 1972)

PRELIMINARY STATEMENT

1. This proceeding involves the application of Olympian Broadcasting Corp. (Olympian), for a construction permit to change the daytime mode of operation of Station WKIP, Poughkeepsie, New York, from directional to nondirectional. The station is now authorized to operate on 1450 kHz, 250 w, 1 Kw, LS. DA-D, U.

2. By Commission's Memorandum Opinion and Order (FCC 71-248), released March 23, 1971, the application of Olympian was designated for hearing. In its designation order the Commission stated:

> The amendment to the Commission's rules to permit, with certain restrictions, Class IV stations to increase daytime power to 1 Kw was based on the assumption that the power increases would be on a uniform basis. As a result, no population receiving service from a Class IV facility would be deprived of such service, and, in addition, the signal strength of the Class IV service area would be improved due to the higher intensity of the signal. Obviously, however, if some Class IV stations are permitted to install new antenna systems with greatly increased efficiency, in addition to being authorized a power increase, a uniform power increase basis cannot be achieved. From data on file, it is clear that the proposed WKIP daytime omnidirectional operation, utilizing the highly efficient radiator, will result in an increase in overlap to the co-channel Class IV operation of WNAB in excess of that caused by either the present 1 Kw daytime directional operation or by omnidirectional operation with 1 Kw utilizing the originally authorized WKIP antenna system which radiated 150 mv/m/kw. Moreover, on the basis of the information on file, it has not been established that

the proposed operation of WKIP would not cause objectionable interference within the service areas of WCTC, New Brunswick, New Jersey, and WMAS, Springfield, Massachusetts. Therefore, it would be inappropriate to take final action on the WKIP application without fully considering the impact of the proposed operation on these stations as well. Accordingly, the Commission will, on its own motion, also name the licensees of Stations WCTC and WMAS parties to the proceeding.

3. The issues specified for the hearing are as follows:

1. To determine the areas and populations which may be expected to gain or lose primary service from the proposed operation of station WKIP and the availability of other primary aural (1 mv/m or greater in the case of FM) service to such areas and populations.

2. To determine whether the proposal of WKIP would cause objectionable interference to stations WNAB, Bridgeport, Connecticut; WCTC, New Brunswick, New Jersey; WMAS, Springfield, Massachusetts; or any other existing standard broadcast stations, and, if so, the nature and extent thereof, the areas and populations affected thereby, and the availability of other primary service to such areas and populations.

3. To determine, in the light of the evidence adduced pursuant to the foregoing issues, whether a grant of the application would serve the public interest, convenience and necessity.

Except as indicated by the above-stated issues, the applicant was found qualified to construct and operate as proposed.

4. In the designation order the following were named parties to the proceeding: WNAB, Inc., licensee of Station WNAB, Bridgeport, Connecticut; Raritan Valley Broadcasting Company, Inc., licensee of Station WCTC, New Brunswick, New Jersey; and Masscom Broadcasting Corporation, licensee of Station WMAS, Springfield, Massachusetts.

5. The Commission directed that, in the event of a grant, the construction permit should contain the conditions specified in Paragraph 11 of the designation order.

6. A prehearing conference was held on April 26, 1971. During the conference, the Examiner ruled that the burden of proceeding with the introduction of evidence and of proof on all issues was upon Olympian. Hearing was convened on December 16, 1971,[1] with the record being closed on the same date.[2] Proposed findings of fact and conclusions were filed by Olympian, WNAB, Inc., and by the Broadcast Bureau on March 1, 1972. Replies were filed by WNAB, Inc. on March 14 and by Olympian on March 15, 1972.

[1] As a result of schedule conflicts and delays in obtaining 1970 population data, the hearing and other procedural dates were postponed.

[2] Masscom Broadcasting Corporation (WMAS), and Raritan Valley Broadcasting Company, Inc. (WCTC), did not participate in the hearing although they were represented at the prehearing conference.

Findings of Fact

THE PROPOSAL

7. Olympian Broadcasting Corp. proposes to modify the daytime operation of Station WKIP at Poughkeepsie, New York and to continue the present nighttime operation. Station WKIP now operates as a Class IV station on 1450 kHz with one kilowatt power daytime and 250 watts at night, unlimited time, employing a two-element directional antenna daytime. Under the proposal, it would change to nondirectional operation daytime with a 340 ft. top-loaded tower radiating an effective field of 270 mv/m/kw.

8. The applicant submits that, under the proposed operation, WKIP will again be using the same omnidirectional antenna system during daytime hours for which it held authorization during a period of about eleven months in 1962 and 1963 and with which it actually operated from January 24, 1963 to August, 1963 (WKIP Ex. 9, pp. 4, 10, 12, 22, 24, 26). This contention is borne out by the history of Station WKIP, revealed by Commission records and discussed below.

9. The Commission's license files show that, prior to late 1962, Station WKIP was authorized to operate with 250 watts power, unlimited time, utilizing a rooftop antenna having an antenna efficiency of 150 mv/m/kw. On September 5, 1962, it was granted a construction permit to operate at a new transmitter site with 1 kilowatt power daytime and 250 watts at night utilizing the 340 ft. top-loaded antenna proposed herein with an antenna efficiency of 270 mv/m/kw. The station operated with this facility from January 24, 1963 to August 13, 1963. On August 14, 1963, by inserting a resistor in the antenna system, Station WKIP reduced the daytime antenna efficiency to 150 mv/m/kw in accordance with Commission instructions because of a remand from the Court of Appeals relative to possible violation of the multiple ownership rules. It operated with 150 mv/m radiation from the tall tower under interim authority for a period of two years and seven months (August 14, 1963 to March 14, 1966). A construction permit to operate with a directional antenna daytime was granted on September 15, 1965, program tests were authorized on March 14, 1966, and a license was issued on May 23, 1966 and is still in effect (See Commission's files; order of designation; WKIP Ex. 9, pp. 4, 12, 22, 24, 26; Ex. 10, p. 1; Tr. 96, 97).

COMMUNITY OF THE APPLICANT

10. Poughkeepsie, New York has a population of 32,029.[3] It is the County Seat of Dutchess County (pop. 222,295), and is situated on the Hudson River some 60 miles north of downtown Manhattan (WKIP Ex. 9, pp. 14, 33). It is not a part of any urbanized or standard metropolitan statistical area. In addition to Station WKIP, Poughkeepsie has one other standard broadcast station, WEOK (1390 kHz, 5 Kw, DA–D, III) two FM stations, WEOK–FM (101.5 MHz,

[3] Population figures herein are based on 1970 U.S. Census data.

4.7 Kw, 830 ft., B) and WSPK (104.7 MHz, 5 Kw, 1250 ft., B), and no TV stations.

COVERAGE

11. To project contours, measured data from the 1966 WKIP proof-of-performance were used for the present directionalized operation, and an effective field of 270 mv/m in conjunction with the measured ground conductivity values was used for the proposed non-directional operation. Distances to the present and proposed daytime interference-free contours and corresponding effective fields in the respective directions are as follows: (WKIP Ex. 9, pp. 6, 7, 8, 30, 31, 32, 40)

	Present		Proposed	
	Distance (miles)	Effective field (mv/m)	Distance (miles)	Effective field (mv/m)
North	21.5	275	21.5	270
East	12.0	190	14.0	270
South	8.5	[1] 75	15.0	270
West	13.5	210	15.0	270

[1] From 140° to 210° true including directions toward Stations WNAB and WCTC; 250 mv/m is now radiated toward Station WMAS (WKIP Ex. 9, pp. 10, 40).

12. The population and area data for the present and proposed WKIP operations are as follows: (WKIP Ex. 9, pp. 6, 7, 8, 16, 17, 30)

	Present		Proposed	
	Population	Area [1]	Population	Area [1]
2.0 mv/m	115,452	228	151,798	305
0.5 mv/m	190,935	740	249,555	1,063
Interference from WNAB, WMAS [2] (percent)	36,536 (19.14)	250	54,924 (22)	415
Interference-free	154,399	490	194,631	648
Gain			40,232	158
Loss			None	None

[1] Square miles.
[2] Objectionable interference to present and proposed Station WKIP from Station WCTC falls entirely within the area of objectionable interference from Station WNAB.

13. According to the 1970 U.S. Census, the population of the city of Poughkeepsie decreased 16.4% from 38,330 in 1960 to 32,029 in 1970, but the population of Dutchess County increased 26.3% from 176,008 in 1960 to 222,295 in 1970. Much of the county population increase has taken place in areas south of Poughkeepsie and especially in Wappinger town and East Fishkill town where the 1960 to 1970 increases amount to 130.1% and 132.1%, respectively. Thus, Station WKIP maintains that the importance to WKIP of increasing its signal toward the south is emphasized by county population growth. The proposed interference-free contour will include 158,413 persons within Dutchess County or 71.26% of the total county population as against 128,757 persons or 57.92% of the total county population with the present operation for an increase of 29,656 persons within the county (WKIP Ex. 9, p. 14). Approximately 73% of the population gain will occur in Dutchess County. All of the proposed gain area is located within New York State (WKIP Ex. 9, pp. 7, 30). Most of the gain occurs to

the south of Poughkeepsie. Urban areas gained within the proposed 2.0 mv/m contour contain 7,868 persons and include all of Wappingers Falls (pop. 5,607) located some 7 miles south of the center of Poughkeepsie and 2,261 persons in Myers Corner (total pop. 2,826) (WKIP Ex. 9, pp. 20, 30–32).

AVAILABILITY OF OTHER SERVICES IN GAIN AREAS

14. Nine standard broadcast stations now provide primary service (0.5 mv/m or greater) to all of the *rural gain area* and 20 other such stations serve various portions thereof. In addition, two FM stations now provide FM service (1.0 mv/m or greater) to all of it and five other FM stations serve portions thereof. A minimum of 17 and a maximum of 27 aural services are available thereto (WKIP Ex. 9, pp. 8, 9, 18, 19). Standard broadcast station WEOK in Poughkeepsie serves at least 75% of the rural gain area and FM stations WEOK–FM and WSPK in Poughkeepsie each serve all of the rural gain area. Two standard broadcast stations now provide primary service (2.0 mv/m or greater) to all of the *urban gain area* and eight other such stations serve various portions thereof. In addition, 3 FM stations provide FM service (1.0 mv/m or greater) to all of the urban gain area and 4 others serve various portions thereof. As a result, from 12 to 14 aural services are available thereto (WKIP Ex. 9, pp. 20, 21). Station WEOK in Poughkeepsie serves at least 75% of the urban gain area and FM stations WEOK–FM and WSPK in Poughkeepsie each serve all of the urban gain area. There are 12 aural services available to all of Wappingers Falls [4] and 13 aural services available to all of Myers Corner (WKIP Ex. 9, p. 20).

INTERFERENCE FROM THE PROPOSAL

A. Objectionable Interference to Station WCTC, New Brunswick, N.J. (1450 kHz, 250 W, 1 Kw-LS, U)

15. The impact on Station WCTC, New Brunswick, N.J. by Station WKIP is shown in the following tabulation [5] (WKIP Ex. 9, pp. 9, 10, 22, 35):

	Population	Area (sq. mi.)
WCTC 0.5 mv/m normally protected contour	1,000,000	1,318
Interference from WFPG, WNAB and WILM	95,814	555
	(9.58%)	(42.11%)
Present interference-free	904,196	763
Additional interference from proposed WKIP [1]	3,246	60
	(0.32%)	(4.55%)
Total interference	99,060	615
	(9.9%)	(46.66%)
New interference-free	900,950	703

[1] In all cases herein, the interfering 0.025 mv/m contour of Station WKIP was based on its 1966 proof-of-performance data combined with conductivity values from Fig. M-3 of the Rules beyond. The objectionable interference developed on Stations WCTC, WMAS and WNAB by proposed Station WKIP is the same as that which occurred when Station WKIP operated omnidirectionally with 1 kilowatt power from January 24, 1963 to August 13, 1963 under a construction permit granted September 5, 1962. Differences from that shown in 1961 in data filed with the Commission result from the 1966 WKIP proof-of-performance and use of the 1970 U.S. Census (WKIP Ex. 9, pp. 8, 10, 12, 22, 24, 26).

[4] Station WKIP does not serve Wappingers Falls at present (WKIP Ex. 9, p. 32).

[5] An effective field of 189 mv/m was used for Station WCTC in conjunction with ground conductivity values from Fig. M-3 of the Rules (WKIP Ex. 9, pp. 6, 35).

The added objectionable interference would fall in rural areas 16 to 21 miles generally north of the WCTC site (WKIP Ex. 9, p. 35). Twelve standard broadcast stations provide primary service (0.5 mv/m or greater) to all of the added area (WKIP Ex. 9, pp. 10, 23, 36).

B. Objectionable Interference to Station WMAS, Springfield, Mass. (1450 kHz, 250 W, 1 Kw–LS, N, IV)

16. The impact on Station WMAS, Springfield, Mass. by Station WKIP is tabulated below [6] (WKIP Ex. 9, pp. 9, 10, 11, 24, 37):

	Population	Area (square miles)
WMAS 0.5 mv/m normally protected contour	483,198	800
Interference from WTSA, WSVP, WNAB and WKIP [1]	37,752	258.9
	(7.81%)	(32.36%)
Present interference-free	445,446	541.1
Additional interference from proposed WKIP	1,911	14.0
	(0.4%)	(1.75%)
Total interference	39,663	272.9
	(8.21%)	(34.11%)
New interference-free	443,535	527.1

[1] 908 persons (0.19 percent) in an area of 19.9 square miles (2.49 percent) receive objectionable interference from present Station WKIP alone.

The additional objectionable interference falls in rural areas 11.5 to 15 miles west and southwest of the WMAS site. Seven standard broadcast stations provide primary service (0.5 mv/m or greater) to all of the additional area, ten serve varying portions and from 10 to 14 AM signals plus at least 5 FM signals (1.0 mv/m or greater) are available in any one sector (WKIP Ex. 9, pp. 11, 25, 38). One of the FM stations which serves all of the additional area is WHVY–FM, which has the same ownership as WMAS and duplicates 50% of the WMAS programming (WKIP Ex. 9, p. 11).

C. Objectionable Interference to Station WNAB, Bridgeport, Connecticut (1450 kHz, 250 W, 1 Kw–LS, U, IV)

17. The impact from the proposed WKIP operation on Station WNAB, Bridgeport, Connecticut is as follows [7] (WKIP Ex. 9, pp. 12, 13, 26, 37):

	Population	Area (sq. mi.)
WNAB 0.5 mv/m normally protected contour	518,683	872.0
Interference from WVOX, WFPG, WSVP, WMAS, WCTC, and WKIP [1]	56,746	434.8
	[2](10.94%)	(49.86%)
Present interference-free	461,937	437.2
Additional interference from proposed WKIP [3]	26,747	109.6
	(5.16%)	(12.57%)
Total interference	83,493	544.4
	(16.19%)	(62.43%)
New interference-free	435,190	327.7

[1] 1,768 persons (0.34 percent) in an area of 6.8 square miles (0.78 percent) receive objectionable interference from present Station WKIP alone.

[2] 38,849 of the 56,746 persons reside on Long Island.

[3] Of these 26,747 persons, 5,225 comprise 19.4 percent of the Bridgeport SMSA; 7,391 comprise 27.63 percent of the Norwalk SMSA; 487, 1.82 percent of the New Haven SMSA; 75, 0.28 percent of the Danbury SMSA; and 13,569 reside in no SMSA. Of the total, 19,777, or 73.94 percent reside in Fairfield County, including 7,391 in Wilton town, 4,149 in Weston town, 4,193 in Redding town and 4,044 in Newtown town. Wilton and Weston are near Norwalk and Wilton is part of the Norwalk SMSA. Redding and Newton are near Danbury outside of any WMSA. Norwalk and Danbury have local AM and FM stations (WKIP Ex. 10, pp. 2, 3).

[6] An effective field of 241 mv/m was used for Station WMAS in conjunction with ground conductivity values from Fig. M–3 of the Rules (WKIP Ex. 9, pp. 6, 30, 37).

[7] An effective field of 237 mv/m was used for Station WNAB in conjunction with ground conductivity values from Fig. M–3 of the Rules (WKIP Ex. 9, pp. 6, 12, 30, 37).

The added interference area lies entirely in the state of Connecticut in rural areas 8.5 to 14 miles southwest, west, northwest, north and northeast of the WNAB site (WKIP Ex. 9, pp. 12, 13, 26, 37).

18. Any interference from proposed Station WKIP that occurs on Long Island falls in urbanized areas which are not served by Station WNAB (WKIP Ex. 9, pp. 14, 37, 39). Nine standard broadcast stations provide primary service (0.5 mv/m or greater) to all of the new area of objectionable interference to Station WNAB, 29 serve portions and from 15 to 24 standard broadcast stations serve any one portion thereof (WKIP Ex. 9, pp. 13, 27, 28, 39).

Conclusions

1. Olympian Broadcasting Corp. seeks authorization to change the daytime facilities of Station WKIP at Poughkeepsie, New York. The nighttime operation would remain unchanged. Station WKIP operates as a Class IV station, unlimited time, on 1450 kHz with 1 kilowatt power daytime and 250 watts at night employing a two-element directional antenna during daytime hours. Under the proposal, Station WKIP would change to a non-directional operation daytime using a 340 ft. top-loaded antenna with an effective field of 270 mv/m.

2. In its order of designation in the present proceeding, the Commission stated that, from data on file, it is clear that the proposed WKIP daytime omnidirectional operation, utilizing the highly efficient radiator, will result in an increase in overlap to the co-channel Class IV operation of Station WNAB (and possibly others) in excess of that caused by either the present 1 Kw daytime directional operation or by omnidirectional operation with 1 Kw utilizing the originally authorized WKIP antenna system which radiated 150 mv/m/kw.

3. Poughkeepsie, with a population of 32,029 persons, is the County Seat of Dutchess County, which has a population of 222,295 persons. It lies some 60 miles north of the center of New York City outside of any urbanized area or standard metropolitan statistical area. Two AM, two FM and no TV stations are licensed to Poughkeepsie.

4. The proposed omnidirectional operation would cause no loss of service to persons presently served by WKIP and would result in a gain of WKIP primary service daytime involving 40,232 persons in an area of 158 square miles. WKIP would realize a 26% population gain under its proposed operation. The gain area includes 29,656 persons located in the southern part of Dutchess County in Wappinger town and East Fishkill town, both of which have grown some 130% since 1960.[8] The population gain in Dutchess County would constitute approximately 73% of those receiving a new service from Station WKIP. Of the 29,656 population gain in Dutchess County, 5,607 persons reside in Wappingers Falls, located some seven miles south of the center of Poughkeepsie, and 2,261 persons in Myers Corner.

5. Nine standard broadcast stations now provide primary service to all of the proposed rural gain area and two FM stations now serve all of it. In addition, 20 other AM stations and 2 other FM stations serve

[8] Wappinger town has a population of 22,040 and East Fishkill town, a population of 11,092 (Off. Not., 1970 U.S. Census).

various portions thereof. A minimum of 17 and a maximum of 27 *aural* services are now available in the *rural* gain area. Standard broadcast station WEOK in Poughkeepsie serves at least 75% of this area and FM stations WEOK–FM and WSPK in Poughkeepsie each serve all of it. Two standard broadcast stations serve all of the urban gain area and 8 other AM stations serve portions thereof. In addition, 3 FM stations provide service to all of the urban gain area and 4 others serve portions thereof. Consequently, from 12 to 14 *aural* services are now available to the *urban* gain area.

6. The applicant's proposal would cause additional objectionable interference to Station WCTC, New Brunswick, New Jersey, affecting 3,246 persons and 60 square miles. The increase in interference in terms of population would be 0.32%, raising the interference to Station WCTC caused by other stations from 9.58% to 9.9%. Twelve AM stations provide service to all of the new interference area. The small (0.32%) amount of interference to WCTC that would be occasioned by the proposal can be aptly characterized as "minimal".

7. Objectionable interference would also be caused by the proposed operation to Station WMAS, Springfield, Massachusetts. This interference would be additional to that now received by Station WMAS and would affect 1,911 persons in 14 square miles, thereby raising the interference in terms of population from 7.81% to 8.21%, or 0.4%. From 10 to 14 AM signals and at least 5 FM signals are available to the additional interference area. The above-mentioned data indicate that only minimal interference to Station WMAS would be caused by the WKIP proposal.

8. Station WNAB, Bridgeport, Connecticut, would receive additional interference from the WKIP proposal to the extent of 26,747 persons in an area of 109.6 square miles. In terms of population, the additional interference would constitute 5.16%, raising the total interference to Station WNAB from 10.94% to 16.10%. Of those persons affected by the added interference, 73.94% (19,777 persons) reside in Fairfield County in which Bridgeport is located. From 15 to 24 AM stations serve the new Station WNAB interference area.

9. The applicant notes that Station WKIP will again be using the same omnidirectional antenna system during daytime hours for which it held authorization during a period of about eleven months in 1962 and 1963 and with which it actually operated from January 24, 1963 to August, 1963.[9] This was the result of a Commission action taken September 5, 1962, whereby Station WKIP was granted a construction permit to increase daytime power from 250 watts to 1 kilowatt using an omnidirectional antenna and at the same time increase antenna efficiency from 150 mv/m to 270 mv/m. The power increase was made in accordance with a Commission action on May 28, 1958, when it amended the rules to provide that Class IV stations may be authorized a maximum daytime power of 1 kilowatt (17 RR 1541). Previously, the power for this class station had been limited to 250 watts. On August 14, 1963, Station WKIP reduced the daytime an-

[9] Station WKIP operated with the proposed 340 ft. tower at reduced antenna efficiency of 150 mv/m/kw effective field under interim authority for a period of 2 years and 7 months from August 14, 1963 to March 14, 1966.

tenna efficiency to 150 mv/m/kw to avoid overlap with a commonly owned station, and on September 15, 1965, received authorization for its present directional antenna. Subsequent to the above-mentioned grant for power increase and increase in antenna efficiency to 270 mv/m made September 5, 1962, the Commission determined that, in the absence of a showing that objectionable interference would not result, the normal benefits which would accrue from power increases to 1 kilowatt would not be achieved unless the power increases were accomplished without any increase in antenna efficiency (footnote 6, designation Order).

10. Although the Commission, in the order of designation, did not specifically state that it viewed the proposal to go from 1 kilowatt directional to 1 kilowatt non-directional operation in the same light as a power increase of a Class IV station, it did note that the requested effective field of 270 mv/m/kw was in excess of the 150 mv/m/kw radiated by Station WKIP in late 1962 when it operated with 250 watts power daytime for the last time, and pointed out that, in addition to changing from directional to non-directional operation daytime, the applicant was simultaneously requesting an increase in effective field beyond that allowed under existing policy when a Class IV station increases daytime power.

11. The issues specified in this proceeding require a determination relative to the gain or loss of WKIP primary service as well as to the impact of the proposed operation on the operations of three existing stations. The long-established decisional test applied by the Commission to the facts ascertained under these issues where there is resulting objectionable interference is "whether the need for the proposed service outweighs the need for the service which will be lost by reason of such interference." The findings of fact show that the applicant's rural gain area receives from 17 to 27 aural services and that the urban gain area receives from 12 to 14. Two Poughkeepsie FM stations serve all of the gain area, both rural and urban portions, and AM station WEOK in Poughkeepsie serves at least 75% of the gain area, both rural and urban portions. Thus, the population in the gain area, approximately 73% of whom reside in Dutchess County, now enjoy an abundance of radio service which includes FM service from 2 Poughkeepsie stations and AM service in at least 75% of the gain area from a Poughkeepsie station. Similarly, the populations in the areas of objectionable interference that would be suffered by Station WMAS, WCTC and WNAB all receive a plenitude of service since at least 10, 12 and 15 AM services are available to them, respectively. Based upon consideration of the number of services available to the proposed WKIP gain area and to the areas which would lose service, it is concluded that the applicant has not made a persuasive showing of a preponderating need for service to such gain area.

12. It is true that the applicant can point to a gain of some forty thousand persons which would constitute a 26% increase in population served and also result in a net gain of about 8,500 persons. But these gains in service can be given no overwhelming weight since there are so many services already available to the gain area and, significantly, loss of service to WNAB involving 26,747 persons would increase from 10.94% to 16.10% of the population in its normally protected contour.

No justification for this added substantial encroachment has been shown. WKIP has urged that grant of its application would only reinstate the antenna formerly authorized for its operation and would allow it to regain areas it had served from January to August, 1963. However, it is of decisional significance to note, as the Commission did in footnote 6 of the designation Order, that the 1962 omnidirectional increase in daytime power and antenna efficiency authorized for WKIP was made *prior* to the Commission's determination that a Class IV station power increase should be accomplished without an increase in antenna efficiency. There is nothing in Commission regulation or policy which lends color to the applicant's implicit claim that the 1962 authorization gave rise to an indefeasible equity which the Commission is bound to recognize at this time. This contention must fail when it is realized too that the intent of the Commission in permitting Class IV increases to 1 Kw was based on the assumption that the power increase would be on a uniform basis and that permitting some Class IV stations to install new antenna systems with greatly increased efficiency would frustrate this intention.

13. It must be observed that applicant's reliance on the Commission's ruling in *North Shore Broadcasting Corp.* (*WESX*), 8 FCC 2d 741, 742 (1967), and the Examiner's decision in *North Shore Broadcasting Corp.*, 12 FCC 2d 687 (1968), is misplaced. The first of these cited cases, insofar as apposite, involved a matter of increased overlap to a commonly owned station resulting from an antenna change which the Commission treated to the same effect as a power increase. The point at issue was whether Section 73.35(a) of the Rules should be waived. The present proceeding involves neither Section 73.35(a) nor the question of overlap. As for the second *North Shore* case, *supra*, suffice it to say that had a net population gain of 244,512 persons to the applicant, removal of interference to a second station involving over 6,000 persons, and replacement of service from the same station involving 860 persons. Because of the egregious disparity between the gain and loss figures in the cited case and the present one, the efficacy of the former as a precedent is less than microscopic.

14. Since it has been concluded that the applicant has failed to satisfy the preponderant need test and has not otherwise shown that Commission regulations, policy or precedent justify a grant of its application, it follows that a grant would not be in the public interest.

Accordingly, IT IS ORDERED, That, unless an appeal from this Initial Decision is taken by a party or the Commission reviews the Initial Decision on its own motion, in accordance with the provisions of Section 1.276 of the Rules, the application of Olympian Broadcasting Corp. to change the daytime mode of operation of Station WKIP, Poughkeepsie, New York, from directional to non-directional, utilizing a 340 ft. top-loaded tower radiating an effective field of 270 mv/m/kv IS DENIED.

ISADORE A. HONIG,
Hearing Examiner,
Federal Communications Commission.

109-029—73——12

F.C.C. 73-170

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of
RADIO WLTO, INC., MIAMI, FLA.
For Change of Call Sign From WLTO to WCMQ

MEMORANDUM OPINION AND ORDER

(Adopted February 14, 1973; Released February 21, 1973)

BY THE COMMISSION: COMMISSIONER REID ABSENT.

1. We have for consideration the above-captioned application; an objection thereto dated October 13, 1972, from CMQ Corporation, Miami, Florida; staff actions of October 25 and November 1, 1972, denying the objection and assigning the call sign WCMQ to Radio WLTO; CMQ Corporation's Application for Review of staff action filed November 24, 1972; Radio WLTO's Opposition of December 7, 1972; and all responsive and related pleadings.

2. The complainant (CMQ Corporation) is a Miami-based organization engaged in the production and distribution of Spanish-language radio programming throughout the Western Hemisphere, and views the above-captioned call sign change as a transparent and undenied effort by Radio WLTO (a Spanish-language broadcaster) to traffic in its corporate name, reputation, and good will. The principals behind the CMQ Corporation (Mr. Abel Mestre and members of his family) were the owners of Circuito CMQ, S.A., the licensee of radio station CMQ, Havana, during the pre-Castro years. Radio station CMQ was nationalized by the Castro government in 1960, and now operates from Santa Clara, Cuba, on 630 kHz. The staff was not aware when it granted the change in call sign that radio station CMQ was still in operation and that it still delivers a listenable signal in the Miami area.

3. The staff denial of CMQ Corporation's earlier objection was premised, in part, on our holdings in *Shamrock Development Corporation* (*WDIZ*), 32 FCC 2d 82 (1971), and *United Television, Inc.* (*KMGM-TV*), 14 RR 573 (1956), in which we declined to protect the trade names of non-licensees against the assignment of radio and television call signs alleged to be confusingly similar. Such objections, we held, are properly adjusted by private litigation.

4. While conceding the validity of these precedents, CMQ Corporation, as a major supplier of the very type of programming carried by Radio WLTO, seeks to distinguish its situation from businesses and organizations having fewer ties with the broadcast industry. Citing *National Broadcasting Company*, 37 FCC 427 (1964), *Sarkes Tarzian, Inc.*, 24 FCC 2d 643 (1970), and *KSID, Inc.*, 22 FCC 2d 833 (1970),

wherein we considered the anti-competitive and unfair trade practices of applicants and licensees in other contexts, CMQ Corporation asserts that its unique relationship with the broadcast industry warrants a departure from the policy expressed in *Shamrock* and *United*, *supra*. We find it unnecessary to reach this question for, in our view, the case must be decided on other grounds.

5. Although not placed squarely in issue by either party to this dispute, the call sign CMQ, as already noted, is still in use in Cuba by a Class I–D station operating on a frequency designated internationally as a Cuban clear channel (630 kHz). Notwithstanding the absence of diplomatic relations with Cuba, we are compelled to take official notice of the fact that CMQ delivers a primary (groundwave) service throughout the Miami metropolitan area,[1] where it can be received by thousands of Spanish-speaking residents. The presence on the AM dial of a CMQ and a WCMQ, both Spanish-language stations, certainly creates confusion concerning station identity or at least the impression that the two stations are somehow linked in ownership and operation. Wholly apart from any question of affording call sign protection to the Cuban government, we find this arrangement to disserve the listening public in the Miami area.

6. Accordingly, IT IS ORDERED, That CMQ Corporation's Application for Review IS GRANTED; the staff actions of October 25 and November 1, 1972, denying CMQ Corporation's initial objection and assigning the call sign WCMQ to Radio WLTO ARE SET ASIDE; and CMQ Corporation's initial objection of October 13, 1972, IS SUSTAINED.

7. IT IS FURTHER ORDERED, That if a new call sign is desired, an application for five (5) call-letter combinations, in descending order of preference, SHALL BE SUBMITTED FORTHWITH by Radio WLTO, Inc., in accordance with the provisions of section 1.550 of our rules, but without payment of filing fee.

8. IT IS FURTHER ORDERED, That if Radio WLTO fails to file such an application within ten (10) days after the release of this Memorandum Opinion and Order, it SHALL REVERT to the use of its former call sign (WLTO), and SHALL NOTIFY the Commission accordingly.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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[1] In listening tests conducted February 2, 1973, by our Miami field office, CMQ's signal strength was measured at three separate locations in downtown Miami. The values obtained were 5 mV/m, 2.2 mV/m, and 2.5 mV/m.

F.C.C. 73R–77

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of JAY SADOW (WRIP), CHATTANOOGA, TENN.	Docket No. 18901 File No. BP–17792
ROCK CITY BROADCASTING, INC., CHATTANOOGA, TENN.	Docket No. 18902 File No. BP–17993
For Construction Permits	

Appearances

Martin E. Firestone, *Martin Blumenthal* and *Michael Finkelstein*, on behalf of Jay Sadow; *Morton L. Berfield*, *Edward Wholl* and *Lewis I. Cohen*, on behalf of Rock City Broadcasting, Inc.; and *Philip V. Permut*, *Charles A. Zielinski* and *William D. Silva*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted February 13, 1973; Released February 23, 1973)

BY THE REVIEW BOARD: BERKEMEYER, NELSON, AND PINCOCK.

1. This proceeding involves the application of Jay Sadow (Sadow) for a construction permit to change the operation of Class III standard broadcast Station WRIP from 980 kHz, 500 w, DA, day, Rossville, Georgia, to Class II, 1190 kHz, 50 kw, DA, day, Chattanooga, Tennessee, and the mutually exclusive application of Rock City Broadcasting, Inc. (Rock City) for a construction permit for a new Class II standard broadcast station on 1190 kHz, 10 kw, DA, day, Chattanooga, Tennessee. By Order, FCC 70–705, released July 9, 1970, the Commission designated the applications for hearing and by Orders, FCC 70R–362 and 71R–116, released October 27, 1970 and April 9, 1971, respectively, the Review Board enlarged the issues. Of the 12 issues tried, only a financial issue with respect to Rock City and a 307(b) issue with respect to Sadow remain in dispute.[1] In his Initial Decision, FCC 71D–85, released November 9, 1971, Administrative Law Judge Chester F. Naumowicz, Jr., concluded that the proposed relocation of Station WRIP from Rossville, Georgia, to Chattanooga, Tennessee, would not be a fair, efficient and equitable distribution of radio services and recommended denial of Sadow's application on that ground. The Judge resolved all issues relevant to Rock City favorably to it and recommended a grant to that applicant. In addition to exceptions filed by Sadow, the Review Board has before it several petitions

[1] No exceptions are addressed to the Presiding Judge's evaluation of *Suburban* and financial issues favorably to Sadow, engineering issues favorably to Rock City, and a Section 73.188(b)(2) issue favorably to both applicants. The Judge's conclusions under these issues are correct and will be affirmed.

for leave to amend filed by Rock City reporting and attempting to explain certain ownership and financial changes. The Board has reviewed the Initial Decision in light of the record, the exceptions and brief filed by Sadow, the reply filed by Rock City, and the arguments of the parties before a panel of the Board on October 5, 1972. We believe the Presiding Judge's findings are substantially accurate and his conclusions sound and, except as modified herein and in the attached Appendix, those findings and conclusions are adopted. Therefore, in this Decision, we shall treat briefly the major exceptions addressed to the Initial Decision, as well as discuss the petitions for leave to amend which we shall grant.

FINANCIAL ISSUE RE ROCK CITY

2. According to Rock City's estimates, it will require funds in an amount of $203,740 in order to construct its proposed station and operate for one year without reliance on revenues.[2] To meet this requirement, Rock City relies on a proposed $220,000 bank loan from the American National Bank and Trust Company. As evidence of the loan commitment, Rock City submitted a letter dated November 30, 1970, and signed by Cranston Pearce, Senior Vice President of the Bank, committing it to lend Rock City an amount "up to $220,000" with no principal payments due in the first year and interest at 8%. The bank letter states that the loan is to be guaranteed by Rock City Gardens, Inc., the applicant's parent corporation. Rock City also submitted a letter of the same date from E. Y. Chapin, III, its parent corporation's president and majority stockholder, confirming guarantee of the bank loan. The applicant introduced its balance sheet, dated October 30, 1970, which lists current assets of $8,696.26 and current liabilities of $84,144.75. Of this latter figure, $82,338.39 represents two notes payable, one for $60,000 to the American National Bank and Trust Company, and the other to Rock City Gardens, Inc. E. Y. Chapin, IV, president of the applicant, testified that the $60,000 represented a 90-day note which had been renewed regularly up to the time of the hearing. Chapin IV described the repayment schedule for the note, which was taken out on December 28, 1967, in the original sum of $65,000, and which has periodically fluctuated, as "extremely loose". The original plan was to repay one-third of the loan every two years, but this plan was not put in writing and the bank has not demanded the full $60,000. The loan was made in connection with Rock City's purchase of Station WLOM(FM), Chattanooga, Tennessee. The November 30, 1970, bank letter from Mr. Pearce states that the $220,000 loan is in addition to the earlier commitment. Finally, Rock City submitted a letter from counsel for the American National Bank and Trust Company stating their opinion that: (1) the $220,000 loan is binding upon the bank and not conditioned on repayment of any other loan; (2) Cranston Pearce could legitimately make the commit-

[2] Rock City's costs include: buildings, $30,000; equipment down payment, $17,250; legal, engineering, installation and miscellaneous expenses, $11,000; equipment payments and interest, $21,390; and first-year operating costs, $120,000. To the total figure, $4,100 should be added for the cost of detuning water tanks which exist in the vicinity of its transmitter site.

ment on behalf of the bank; and (3) the loan was not in contravention of state or federal banking law.

3. Sadow takes the position that the Presiding Judge, in concluding that Rock City is financially qualified, erred in not considering operating losses of Rock City's FM broadcast station, as well as its current liabilities. Specifically, Sadow argues that Rock City's commonly owned FM station has sustained an average loss over the last three years of $18,361 and that this figure must be included in the applicant's expenses. The applicant's total financial situation must be examined, Sadow maintains, citing *KSIG Broadcasting Company, Inc.* v. *FCC*, 445 F.2d 704, 21 RR 2d 2144 (1971); and Sawnee Broadcasting Co. (*WSNE*), 3 FCC 2d 561, 7 RR 2d 405 (1966), in support. As for Rock City's bank letter, Sadow notes that the letter does not expressly state that the bank will not demand payment on the 90-day $60,000 loan at the conclusion of any of the renewal periods. Therefore, Sadow contends, the $60,000 must be regarded as a current liability, thereby reducing Rock City's available funds by that amount. Sadow also excepts to the admission of the bank letter without supporting testimony from its author, Cranston Pearce. The Judge further erred, Sadow contends, in assuming that the $220,000 loan would be used exclusively in connection with Rock City's proposal. These funds, Sadow maintains, cannot be shielded from corporate obligations which may arise. Sadow concludes that Rock City will fall short of its needs and is hence not financially qualified.[3]

4. The Review Board is of the view that Rock City has satisfactorily established its financial qualifications. The bank commitment letter introduced by Rock City recites the amount and terms of the loan, the interest rate, and who the guarantor is. An applicant must provide "reasonable assurance" of the availability of a bank loan. One such form of assurance traditionally accepted is a bank commitment letter. *Tri-City Broadcasting Co.*, 35 FCC 364, 1 RR 2d 81 (1963). A bank loan commitment letter, absent a showing which questions the validity of the letter or the bank's ability to make the loan, satisfies Commission requirements. *McCreary Broadcasting Corp.*, 27 FCC 2d 964, 21 RR 2d 321 (1971); *cf. Lamar Life Broadcasting Co.*, 26 FCC 2d 932, 20 RR 2d 981 (1971). There is no record evidence casting doubt on the validity of the letter or the ability of the bank to make the loan; in fact, counsel for Sadow conceded the first point. The letter is signed by Cranston Pearce, Senior Vice President, and E. Y. Chapin III testified that he was familiar with Pearce, his duties and responsibilities at the bank, how the bank proceeded to make loans, and could state that Pearce had bank authorization to make a loan for the purpose and in the amount indicated. In these circumstances we believe reasonable assurance of the loan's availability has been furnished.

5. The Board also agrees with the Presiding Judge's ruling that the bank letter was admissible without the presence of its author, Cranston Pearce. See *Chapman Radio and Television Co.*, 6 FCC 2d 768, 9 RR 2d 595 (1967) and the cases cited therein. Sadow raised no objection

[3] Sadow adds that, although it has not discussed the $20,000 owed to Rock City's parent corporation, the record does not establish that the latter's financial status would preclude call of the debt.

to the authenticity of the bank letter; E. Y. Chapin, III, president and treasurer of Rock City and its parent corporation, and E. Y. Chapin, IV, vice president of the applicant, were both present to testify concerning the bank loan; and this testimony raised no questions which would require examination of bank officials. Indeed, other means of eliciting further information regarding the loan were offered and available to Sadow, but the latter chose not to pursue them. In these circumstances, we believe no legitimate challenge to the availability or validity of the loan has been raised by Sadow.

6. The Board does not agree with Sadow's contention that the prior $60,000 loan made in connection with Rock City's purchase of Station WLOM (FM), Chattanooga, should be considered part of Rock City's first-year costs. To begin with, E. Y. Chapin, III, testified that the $220,000 loan was to be used exclusively in connection with Rock City's AM proposal and that any additional monies needed for the FM station would come from other sources such as its parent corporation or further bank loans. The bank loan letter specifically states that the loan is in addition to the bank's previous commitment in connection with the purchase of WLOM, and the opinion letter of bank counsel states that the $220,000 commitment is not conditioned upon repayment of any pre-existing loans. The record also establishes that the terms of the $60,000 loan are flexible; that it has been renewed as a matter of course every 90 days; that it, too, is being guaranteed by Rock City's parent corporation; and that both corporations enjoy a close and harmonious business relationship with the bank. Given these circumstances, the Board is of the view that the supposition that the bank will call the $60,000 loan during Rock City's first year of operation is purely speculative and without evidentiary support.[4] The same may be said of the approximately $22,000 listed on Rock City's balance sheet as owing from it to its parent corporation, Rock City Gardens, Inc. Sadow inferentially questions whether this advance will be called during Rock City's first year of operation but supplies neither arguments nor record support for this unlikely proposition.

7. We do not agree with Sadow's contention that the Board must consider Rock City's losses in the FM station operation. The precedent cited by Sadow in support of his position is inapposite. *Sawnee Broadcasting Co.* (*WSNE*), *supra*, upon which Sadow places principal reliance, involved a Commission remand of a proceeding where an applicant was relying on revenue to finance his proposal but had not adequately supported its estimate. The applicant therein proposed modification of his standard broadcast station at the same time he proposed construction of a new FM station. The Commission, citing *Nelson Broadcasting Company*, FCC 64R–505, 4 RR 2d 87 (1964), held that the financial arrangements for both stations must be considered together. The important facts in *Nelson* were that the applicant relied on identical assets to support both proposed stations; he had not ear-

[4] Compare *Erwin O'Conner Broadcasting Co.*, FCC 72R–315, — FCC 2d —, where the Board did treat a 90-day note as a current liability. However, the showing in the instant case is far more persuasive than the one in *O'Conner*. Here, the surrounding circumstances, particularly the additional loan and the terms of its making, are consistent with the conclusion that the earlier loan need not be treated as a current liability; in *O'Conner* the record did not contain such supporting details.

marked which assets were to be used for which proposal; and the assets were not sufficient to support both operations. The situation with respect to Rock City, however, is significantly different. First, Rock City does not rely upon revenues from either Station WLOM or its proposed standard broadcast station. Second, its FM station is on the air and does not therefore require comparable initial construction and operation outlays. Most important, the record clearly establishes that the $220,000 loan is earmarked exclusively for the AM proposal. Also, the record indicates other sources of financing for the FM station, and there is recent evidence of revenue from the FM operation. All things considered, we believe the Judge's conclusion that Rock City is financially qualified should be affirmed.

8. On May 25, 1972, subsequent to the issuance of the Initial Decision, Rock City filed a petition for leave to amend its application. The amendment reports the creation by Rock City of an option to purchase its FM station, WLOM, in favor of Turner Communications Corporation (Turner) as well as other changes in stock ownership and management in its parent corporation.[5] On September 28, 1972, Rock City filed a second petition for leave to amend reporting that on September 8, 1972, the Commission accepted for filing an application for assignment of WLOM (FM) from Rock City to Turner. At oral argument, held October 5, 1972, Broadcast Bureau counsel pointed out that the assignment application included a Rock City balance sheet listing notes payable in the amount of $123,000, approximately $41,000 higher than those listed on the balance sheet submitted at the hearing. The Bureau therefore took the position that, although it concurred with the Administrative Law Judge's determination that Rock City was financially qualified on the basis of the hearing record, it could not make that determination now without knowing the nature of the additional liabilities. Therefore, counsel for Rock City expressed the desire to explain the difference and the Board invited him to file an additional pleading and afforded the other parties an opportunity to respond. (Tr. 267.)

9. Rock City, on October 12, 1972, filed a supplement to petition for leave to amend, reporting that the $123,000 consists of the $65,000 90-day note which has been regularly renewed since its execution at the time of acquisition of WLOM in January, 1968, and $58,000 in notes payable to the corporate parent company, Rock City Gardens, Inc., and concluding that Rock City's financial position remains basically the same as it was at hearing. In comments, filed October 13, 1972, Sadow argues that Rock City's amendment does not explain the increase in the 90-day note from $60,000 at the time of the hearing to its present $65,000, nor does it contain a specific one-year moratorium on the note from the bank; therefore, Sadow contends, Rock City is not financially qualified. In its comments, filed October 16, 1972, the Bureau, in addition to expressing continuing uncertainty as to Rock City's financial condition argues that a Rule 1.65 question is raised as well because of the failure to report $41,000 in new liabilities. In

[5] On May 26, 1972, Sadow filed a response, and on June 7, 1972, the Bureau filed comments on the petition for leave to amend.

response to comments by the other parties, particularly the Broadcast Bureau, Rock City, on November 8, 1972, filed a second supplemental petition for leave to amend. In its second supplemental petition, Rock City includes a new letter from the lending bank, dated October 31, 1972, affirming that the $220,000 loan upon which the applicant relied at hearing to establish its financial qualifications is still available and is in addition to the prior loan made in connection with the WLOM (FM) application. Therefore, Rock City states, it is still financially qualified. Rock City also argues that no significant changes re Rule 1.65 have occurred because the $220,000 loan is still available, the increased liabilities represent internal corporate notes, and the earlier bank loan, originally $65,000, then $60,000 at the time of the hearing, and which went to $65,000 again in June, 1971, does not affect its available loan funds. In an opposition, filed November 14, 1972, Sadow maintains that Rock City's latest amendment should be rejected since it could have included that same material in its October 12, 1972 amendment. Sadow reiterates that Rock City has again failed to answer the serious questions Sadow raises concerning its financial qualifications. However, in its comments, filed November 17, 1972, the Bureau takes the position that Rock City has now adequately explained the circumstances surrounding its reported increase in liabilities, that no need for remand of the proceeding exists, and that Rock City is financially qualified.

10. The Board is of the view that no serious challenge to Rock City's financial qualifications is raised by the recent series of amendments and pleadings and that no need to remand the proceeding exists. The situation which prevailed at hearing remains basically the same. That is, Rock City continues to rely for its financial showing upon a $220,000 bank loan, which is sufficient to offset its estimated first-year costs and the availability of which has been continuously demonstrated by bank letters, the most recent of which is dated October 31, 1972. And, while the amounts of the liabilities questioned by Sadow have increased slightly, the nature of the liabilities, *i.e.*, intercorporate debts and a 90-day bank loan remains the same, and their significance clearly is no greater now than at the time of the hearing. Sadow's only noteworthy argument is that Rock City should have submitted a letter from the bank specifically stating that the $65,000 note would not be called in a particular period of time. However, this is the same argument made by Sadow in his exceptions and supporting brief and, as such, it is dealt with at paragraph 7, *supra*. For the reasons stated therein, and because of the nature of the bank letters, which consistently assure that the $220,000 is above and distinct from the earlier $65,000 loan, we believe a reasonable inference may be drawn that the bank will not thwart the entire plan by calling the full $65,000 loan during the critical first-year period. With respect to the bulk of reported increased liabilities on Rock City's balance sheet, they assume no greater significance now than they did at the time of the hearing in that they are intercorporate obligations owing to the parent corporation from the wholly-owned subsidiary. That no justification for remand exists at this time is further demonstrated by the fact that Sadow had an

unrestricted opportunity to explore the intercorporate debts as they existed at the time of hearing. Indeed, at oral argument, counsel for Sadow indicated that he did not consider it likely that the parent would call these liabilities and so did not press this point. (Tr. 253.) It is also noteworthy that, in his most recent pleadings, while Sadow urges that Rock City has not adequately explained the circumstances surrounding the changes, he does not specifically request remand or further cross-examination. Because the Board does not view these matters as being significant, we do not believe a Rule 1.65 inquiry is called for either. Instead, we agree with the Bureau that Rock City has satisfactorily explained its present financial status and that reasonable assurance exists that the loan funds it relies upon are available to it. For all the reasons stated, we conclude that Rock City is financially qualified and that the recent amendments should be accepted.[6]

SECTION 307(b) ISSUE RE SADOW

11. Sadow proposes to relocate Station WRIP from Rossville, Georgia, 1960 population 4,665, to Chattanooga, Tennessee, 1960 population 130,009.[7] In addition to WRIP, Rossville has licensed to it WRIP–FM, also operated by Sadow. Chattanooga has licensed to it 6 standard broadcast stations, 5 FM stations, 3 VHF and 2 UHF (one educational) television stations. The relocation of WRIP would result in a net gain in service to 179,750 persons in 4,425 square miles and 1,790 persons would lose their present service from Station WRIP. Within the 0.5 mv/m rural gain area 63 other standard broadcast signals are available as well as 15 1 mv/m FM services. There are a minimum of 2 standard broadcast services available and a maximum of 17 within the rural gain area; considering FM, there are a minimum of 3 and a maximum of 23. Due to discontinuance of pre-sunrise operation, proposed Station WRIP would lose from 15 minutes to 1 hour and 45 minutes of its present broadcast day, depending on time of year, or from 1.9% of its broadcast day to 15.4% in its new operation.

12. The Board is of the view that these facts clearly warrant the Presiding Judge's conclusion that the objectives of Section 307(b) would be disserved by a grant of Sadow's application. Where an applicant seeks to withdraw service it must establish that its proposal is consistent with the mandate of Section 307(b) of the Act. See *Pioneer States Broadcasters, Inc.*, 34 FCC 625 (1963). In *Central Coast Television*, 14 FCC 2d 985, 14 RR 2d 575 (1968), the Board stated the controlling principle as follows: "[O]nce in operation, a station assumes an obligation to maintain service to its viewing audience and the withdrawal or downgrading of existing service is justifiable only if offsetting factors are shown which establish that the public generally will be benefited." 14 FCC 2d at 1000, 14 RR 2d at 596 (citing *Triangle Publications, Inc*, (*WNHC–TV*), *supra*, 37 FCC at 313, 3

[6] On December 11, 1972, Sadow filed a petition for leave to amend reporting the filing on October 24, 1972, of an application for modification of the facilities of Station WRIP–FM, Rossville, Georgia. No opposition to this pleading has been filed and we believe the amendment should be accepted.

[7] Preliminary 1970 Census figures show 3,727 persons living in Rossville and 113,003 living in Chattanooga.

RR 2d at 47). See also *Television Corporation of Michigan* v. *FCC*, 111 U.S. App. D.C. 101, 103, 294 F. 2d 730, 732, 21 RR 2107, 2110 (1961); *Hall* v. *FCC*, 99 U.S. App. D.C. 86, 91, 237 F. 2d 567, 572, 14 RR 2009, 2012 (1956). Here, the only substantial public interest benefit which would result from a grant of Sadow's application is a large gain in the number of persons who would receive the signal of WRIP. However, none of the persons in the gain area are underserved, and, to be weighed against this benefit, are the following detriments: a small number of persons would lose service from WRIP, those who would continue to receive the signal would no longer receive the presunrise operation, and Rossville would lose one of its two, and its only AM, transmission service. We cannot find that the service gain outweighs these detriments, particularly the loss of Rossville's only local AM and its second local aural transmission service,[8] and we therefore must conclude that Sadow's proposal is violative of the goals of Section 307(b).[9]

13. In the face of contrary policy and precedent, Sadow seeks to justify his designed move on the basis of what the Judge termed a "regional or metro" theory of station allocations. However, despite Sadow's assertions and intentions, Commission policy would require, if the instant application is granted, that his primary obligation be to Chattanooga, his proposed city of license, and not to Rossville.[10] See *e.g.*, Report and Order, *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650, 21 RR 2d 1507 (1971); *cf. Star of the Plains Broadcasting Co.* v. *FCC*, 267 F.2d 629, 18 RR 2072 (1959); *Dennis A. and Willard D. Sleighter* (*WWDS*), 6 FCC 2d 662, 9 RR 2d 320 (1967); *Service Broadcasting Corp.*, 36 FCC 1085, 2 RR 2d 539 (1964). Furthermore, Sadow's attempts to show that Rossville's activities and business are only an extension of those of Chattanooga are unpersuasive. The record reflects that Rossville is an independent community. Although there are similarities and ties between Rossville and Chattanooga, Rossville has its own government, police force and fire department, parks and recreational facilities, and financial and business institutions. In other words, it possesses the governmental, social and economic attributes of an independent community. See *Service Broadcasting Corp.*, *supra;* compare *Risner Broadcasting, Inc.*, *supra.* Indeed, both Sadow, by virtue of his selection of Rossville as sites for an AM and FM station, and the Commission, by virtue of its grants to Sadow for those facilities, have

[8] See *Babcom, Inc.*, 24 FCC 2d 690, 19 RR 2d 883 (1970), reconsideration denied 27 FCC 2d 437, 21 RR 2d 6 (1971), reversed and remanded on other grounds 31 FCC 2d 425, 22 RR 2d 828 (1971), where the Board discussed the significance of a choice of transmission services.

[9] In *WKYR, Inc.* (*WKYR*), 37 FCC 132, 3 RR 2d 1 (1964), the Board did grant an application to move an AM facility to a nearby larger community and to change operation from daytime-only to fulltime. However, the Board pointed out, *inter alia*, that the larger community was a more influential population center; that despite this fact it only had licensed to it two Class IV stations whereas the small town had licensed to it two Class III stations; that the proposal would be more efficient because it would provide a full-time operation; and that the smaller community would retain one local transmission service. By contrast, in this proceeding, there is no such disparity between the size of the communities and services licensed to them; Sadow's proposal is less efficient in terms of hours of operation; and Rossville would be left with no local AM service.

[10] Even if he could show that Chattanooga-Rossville was a community pursuant to Section 73.30(a) of the Rules, he cannot at this point, and without amending, seek to specify a community other than the one applied for. *Risner Broadcasting, Inc.*, 20 FCC 2d 790, 17 RR 2d 1215 (1969); *Five Cities Broadcasting Co., Inc.*, 35 FCC 501 (1963).

recognized the independent existence of Rossville. The Commission has also made clear that to qualify as a community, a place of station location must be "an identifiable population grouping separate and distinct from all others; and that . . . [it] must not enclose *or contain areas or populations more logically identified as*, or associated with, *some other location*." (Emphasis supplied.) *Seven Locks Broadcasting Co.*, FCC 62–140, 22 RR 967. Rossville's characteristics as a community have already been set forth and Sadow would hardly argue that Chattanooga has no independent existence.[11] Therefore, it is difficult to see how the Chattanooga-Rossville area could qualify as a separate community. Finally, Sadow relies on *Radio Crawfordsville, Inc.*, 34 FCC 996 (1963), for the proposition that the Commission may make its own determination as to what constitutes a community. However, that case, a forerunner to the Suburban Community doctrine, involved a determination of whether a proposal is realistically designed to serve a smaller suburb or a metropolitan complex. The analytical approach taken therein was subsequently rejected by the Commission in its 1965 *Policy Statement*, *supra*, and, in any case, is plainly irrelevant to the issues in this case.[12] Under these circumstances, the Board is of the view that the application of Jay Sadow must be denied under the 307(b) issue and that the application of Rock City, being fully qualified should be granted.

14. Accordingly, IT IS ORDERED, That the petitions for leave to amend, filed May 25 and September 28, 1972, the supplement to petitions for leave to amend, filed October 12, 1972, and the second supplemental petition for leave to amend, filed November 8, 1972, by Rock City Broadcasting, Inc., ARE GRANTED, and the amendments contained therein ARE ACCEPTED; and

15. IT IS FURTHER ORDERED, That the petition for leave to amend, filed December 11, 1972, by Jay Sadow, IS GRANTED, and the amendment contained therein IS ACCEPTED; and

16. IT IS FURTHER ORDERED, That the application (BP–17792) of Jay Sadow for a construction permit to change the operation of standard broadcast Station WRIP from Class II, 980 kHz, 500 w, DA, day, Rossville, Georgia, to Class II, 1190 kHz, 50 kw, DA, day, Chattanooga, Tennessee, IS DENIED, and the application (BP–17793) of Rock City Broadcasting, Inc., for a construction permit for a new standard broadcast station, Class II, 1190 kHz, 10 kw, DA, day, Chattanooga, Tennessee, IS GRANTED.

DONALD J. BERKEMEYER,
Member, Review Board,
Federal Communications Commission.

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[11] Sadow did not request dual-city identification. No dual-city identification issue is in the case. See Section 73.30(b) of the Rules and *St. Anthony Television Corp.*, FCC 64–730, 2 RR 2d 348.

[12] We would also reject Sadow's exception questioning the Presiding Judge's suppression of interrogatories designed by Sadow to ascertain program service offered Rossville by other area stations. The Judge correctly ruled that such evidence is precluded under 307(b) absent a specific issue and that the interrogatories would therefore serve no purpose. See *Dennis A. and Willard D. Sleighter (WWDS)*, *supra*; *Central Broadcasting Corp.*, FCC 64R–399, 3 RR 2d 594; *Cookeville Broadcasting Co.*, FCC 60–101, 19 RR 987. Sadow's reliance on *LaFiesta Broadcasting Co.*, 64R–571, 3 RR 2d 996, is unavailing, because interrogatories there were made pursuant to a specific programming issue. This case contains a limited *comparative* programming issue, but not a 307(b) programming issue and Sadow did not request enlargement to add one.

APPENDIX

RULINGS ON EXCEPTIONS OF JAY SADOW

Exception No.	*Ruling*
1	Granted. See note 2 of this Decision.
2	Denied. The Presiding Judge's findings adequately and accurately reflect the record. See paragraph 6 of this Decision.
3	Denied. (1) Rock City's Exhibit 4, p. 1, upon which Sadow relies, points out that the $7,000 in depreciation allowance will be available cash under the "Interest, Depreciation, Lease" listing; (2) for the reasons stated in paragraph 7 of this Decision.
4	Denied. The Presiding Judge's findings adequately reflect the record evidence and the additional material is without decisional significance. See paragraph 13 of this Decision.
5	Granted in substance. Sadow is apparently excepting to the Presiding Judge's failure to include the $4,100 cost of detuning water tanks in Rock City's first-year costs. We have included this figure and distributed a $30,360 net deferred equipment credit in arriving at Rock City's net first-year costs of $203,740. See paragraph 2 of this Decision.
6	Denied for the reasons stated in paragraphs 6 and 10 of this Decision.
7	Denied. (1) Rock City is not relying upon assets listed in its balance sheet to meet first-year costs but upon its $220,000 bank loan; (2) for the reasons stated in paragraph 7 of this Decision.
8	Denied. The 307(b) issue in this proceeding is directed solely to the application of Jay Sadow and its proposal would bring additional service to areas which are already well served. See paragraph 12 of this Decision.
9, 10	Denied for the reasons stated in paragraphs 12–13 of this Decision.
11	Denied for the reasons stated in note 11 of this Decision.
12	Denied for the reasons stated in paragraph 5 of this Decision.

F.C.C. 71D-85

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of JAY SADOW (WRIP), CHATTANOOGA, TENN.	Docket No. 18901 File No. BP-17792
ROCK CITY BROADCASTING, INC., CHATTANOOGA, TENN. For Construction Permits	Docket No. 18902 File No. BP-17993

APPEARANCES

Martin E. Firestone, Martin Blumenthal and *Michael Finkelstein* on behalf of Jay Sadow; *Morton L. Berfield, Edward Wholl* and *Lewis I. Cohen* on behalf of Rock City Broadcasting, Inc.; and *Philip V. Permut, Charles A. Zielinski* and *William D. Silva* on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER CHESTER F. NAUMOWICZ, JR.

(Issued November 5, 1971; Released November 9, 1971)

PRELIMINARY STATEMENT

1. By Commission Order released July 9, 1970, and Review Board Orders released October 27, 1970 and April 9, 1971, the above-captioned applications were consolidated for hearing on the following issues: [1]

1. To determine the efforts made by Jay Sadow to ascertain the community needs and interests of the area to be served and the means by which the applicant proposes to meet those needs and interests.

2. To determine whether the applicants are financially qualified to construct and operate their proposed stations.

3. To determine whether the proposed directional antenna parameters accurately depict the proposed radiation pattern of Rock City Broadcasting, Inc. during critical hours of operation.

4. To determine whether the aerial photographs, the ground plat, the quadrangular map and the geographical coordinates contained in the Rock City Broadcasting, Inc. application accurately depict the location of its proposed antenna site.

5. To determine whether the transmitter site proposed by Rock City Broadcasting, Inc. is satisfactory with particular regard to any conditions which may exist in the vicinity of the antenna system which would distort the proposed antenna radiation patterns.

[1] For convenience, certain of the issues have been renumbered.

6. To determine whether the above proposals would meet the city coverage requirements of Section 73.188(b)(2) of the Commission's rules, and, if not, whether circumstances exist which would warrant a waiver of said section.

7. To determine the areas and populations which would receive primary service from Rock City Broadcasting, Inc., and the availability of other primary aural service (1 mv/m or greater in the case of FM) to such areas and populations.

8. To determine the areas and populations which may be expected to gain or lose primary service from the proposed operation of Station WRIP and the availability of other primary aural service to such areas and populations.

9. To determine in the light of Section 307(b) of the Communications Act of 1934, as amended, whether the proposed operation of Station WRIP would provide a fair, efficient, and equitable distribution of radio service.

10. To determine which of the proposals would on a comparative basis, better serve the public interest.

11. To determine, on a comparative basis, whether a greater need exists for the religious-oriented program service proposed by Jay Sadow (WRIP) or for the news-public affairs program service proposed by Rock City Broadcasting, Inc.

12. To determine, in the light of the evidence adduced pursuant to the foregoing issues which, if either, of the applications should be granted.

2. The applicants published notice of the hearing and notified the Commission thereof pursuant to the governing statute and rules. Conferences and hearings were held on various dates between August 17, 1970 and September 10, 1971 with the record being closed on the later date. The filing of Proposed and Reply findings of fact was concluded by November 3, 1971.

Findings of Fact

Issue No. 1: Sadow's Community Needs Survey Activities

3. Sadow conducted community leader surveys in 1967, February and March, 1970, and May, 1971. In 1967 51 community leaders were contacted. Col. Sadow, relying on his long residence in the area, broke down his contacts among individuals representing governmental, educational, religious, charitable, entertainment, professional and business groups.

4. In 1970, using demographic material available in 1960 census data, an additional 109 persons were contacted. The survey, which included both personal and telephonic interviews, was conducted by Col. and Mrs. Sadow, Mr. Ronnie Currey, the Chief Announcer at WRIP, Miss Georgia Watts, the station's office manager, Mr. Mickey Ryon, a WRIP engineer, and Mrs. Theresa Arnold who is a longtime employee of the Sadows. The individuals contacted represented governmental, educational, minority, religious, charitable, entertainment, professional, business, agricultural, labor and general audience groups.

Their residence was broken down: 52 in Chattanooga; 24 in other Tennessee localities, 20 in Georgia and 13 in Alabama.

5. In 1971 Col. and Mrs. Sadow, and Susan Mashburn, WRIP Office Manager, contacted 63 additional people. Their places of residence included 27 in Chattanooga; 27 in other Tennessee localities; 6 in Georgia; and 3 in Alabama. They represented governmental, religious, educational, business, labor, professional, agricultural, entertainment, charitable and general audience groups.

6. The surveys disclosed opinions that local needs include governmental reorganization, pollution control, urban redevelopment, crime control, development of programs to deal with problems peculiar to the younger and older segments of the community, spiritual and religious development, etc. To deal with these problems Sadow proposes a panel discussion program for the Chattanooga Area Regional Council of Governments; monthly 30-minute programs dealing with youth and crime; weekly programs for the Georgia Game and Fish Commission, and the Tennessee Education Association; and extensive religious programs. Time will also be made available to various conservation organizations, as well as health education and welfare groups and charitable organizations.

ISSUE NO. 2: FINANCIAL QUALIFICATIONS

7. Sadow will require a total of $208,400 to construct and operate his proposed station for one year.[2] Of this, $170,175 will be required in assets available at or before the end of the first year of operation.[3] However, because of the assets on which Sadow has chosen to rely another item must be considered. As noted at paragraph 8, *infra*, Sadow looks to revenue to be generated by the operation of WRIP–AM and FM. Since the record shows the revenue history of the two stations as a total, rather than breaking out the revenues attributable to the AM station only, total revenues cannot be considered unless total costs are considered. The record indicates that the 1970 cost of operating the two stations was $148,000, and Sadow estimates that his proposed modification of the AM facility will add $2,000 to the cost of operation. Thus, the total cost of first year operation to be considered is $150,000, not $100,000 for the AM station alone, and the total assets required in the first year are $220,175, not $170,175.

8. The assets on which Sadow relies include $37,500 in cash, life insurance cash value of $1,500; $18,890 value of mutual fund shares; $2,600 value of over/counter stock; $480,000 in WRIP accounts receivable;[4] and operating revenues to be generated by WRIP–AM and FM.[5] Sadow showed additional fixed assets, but did not indicate how these might be employed to meet his financial requirements.

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[2] Transmitter, $25,000; antenna system, $55,000; building, $3,000; test equipment, $400; engineering, etc., $25,000; cost of operation, $100,000.

[3] Equipment down payment, $20,000; building, $3,000; 2 pre-operation installment payments on equipment, $2,950; other construction costs, $25,000; operation, $100,000; and 12 equipment installment payments, $19,175.

[4] WRIP accounts receivable have a history of being paid off at the approximate rate of $15,000 per month.

[5] WRIP's recent revenue and (profit) record has been: 1967, $122,382 ($21,634); 1968, $141,540 ($26,515); 1969, $170,387 ($31,237); 1970, $182,160 ($34,150).

9. Rock City will require a total of $230,000 to construct its station and operate it for one year.[6] To meet these costs it relies on an equipment credit of $30,360 and a bank loan of $220,000.

10. Rock City's balance sheet of October 30, 1971 shows current liabilities including notes payable of $82,338. While $22,338 is owed to Rock City's parent corporation, $60,000 is owed on a 90-day note to the bank which is to make the $220,000 loan noted at par. 9, *supra*,[7] and was taken out in connection with Rock City's acquisition of its FM station. Rock City established that its relationship with the bank is most cordial, that the outstanding note has been renewed every 90 days as a matter of course at either increased or decreased sums, depending on the convenience of Rock City's parent corporation, and that it intends to devote the proceeds of the prospective $220,000 loan exclusively to its proposed AM station. Moreover, the bank's commitment letter makes it clear that the prospective $220,000 loan is in addition to the outstanding $60,000 loan.

ISSUE NO. 3: DIRECTIONAL ANTENNA PARAMETERS OF ROCK CITY

11. On September 2, 1970, the Examiner accepted an amendment changing the current ratios of towers one and two of the Rock City proposal. As a result of the change the pattern shape and contours are those specified in Rock City's original application.

ISSUE NO. 4: LOCATION OF ROCK CITY ANTENNA SITE

12. Rock City recomputed its site location using a plat supplied by the land owners, known landmarks, and United States topographic maps. The recheck verified that the transmitter site location shown in the application is correct.

ISSUE NO. 5: SITE SUITABILITY

13. There are three water tanks in the vicinity of the Rock City transmitter site, two of which might act as significant reradiators. In the uncontradicted opinion of Rock City's consulting engineer, whose professional qualifications are unchallenged, conventional techniques will detune these structures enough to permit the pattern to be adjusted within the MEOV's both daytime and during critical hours. The total cost of detuning would be $4,100, and the owners of the towers have given their consent to the project.

ISSUE NO. 6: RULE 73.188(B)(2)

14. Sadow would provide a 5 mv/m or greater signal to 97.86% of the population and 91.63% of the area of Chattanooga. A total of 2,809 Chattanooga residents in 3.35 sq. mi. would be outside the 5 mv/m contour, but this area would receive a signal of at least 2.8 mv/m.

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[6] Buildings, $30,000; equipment, $47,610; legal, engineering, installation and miscellaneous, $11,000; installment payments, $21,390; operating cost, $120,000.

[7] The note to which the record speaks has long since fallen due. The record has not been updated to show what disposition was actually made of it. If the Examiner had any real doubt as to Rock City's financial qualifications, he would regard this fact as decisionally significant.

109-029—73——13

Sadow's transmitter site is located 4.5 miles north of Chattanooga, and was selected as being the best available. Other sites from which full compliance with the rule might have been obtained were ruled out because of excessively rugged terrain, because they were unavailable, because they would be too close to an airport or a power complex, or because they would not permit protection of existing stations.

15. Rock City's proposed site is 0.6 miles north of Chattanooga. However, the necessity to protect Station KGKA, Atlanta, Georgia results in patterns whereby small areas of the city lie outside the 5 mv/m contour. During daytime hours 99.07% of the population and 97% of the area of the city would lie within the 5 mv/m contour, but 1,229 persons in 1.2 sq. mi. would be without that contour. However, this area would receive a signal of at least 4 mv/m. During critical hours 99.62% of the population residing in 97.3% of the city's area would be within the 5 mv/m contour, but 504 persons in 1.1 sq. mi. would be outside the 5 mv/m contour. However, this area would receive a signal of at least 2.7 mv/m.

ISSUES NO. 7 AND 8: AREAS AND POPULATIONS

16. Rock City, which proposes a Chattanooga, Tennessee Station on 1190 kc, 10 kw, directional, daytime, would provide the following service:

Contour	Population	Area
Daytime:		
2 mv/m	321,430	1,060
0.5 mv/m	406,833	3,580
Critical hours:		
2 mv/m	274,725	785
0.5 mv/m	365,183	2,930

During daytime hours between 4 and 17 other AM services are available throughout the proposed service area, and during critical hours between 3 and 17 such services are available. During daytime hours 2,486 persons in 35 sq. mi. receive only 4 other AM services. During critical hours 389 persons in 15 sq. mi. receive only 3 other AM services, and 756 persons in 29 sq. mi. receive only 4 other such services. If FM services are also considered, all rural areas have at least 5 other aural services at all times, and all urban areas have at least 7 such services available.

17. Sadow's Station WRIP is presently located in Rossville, Georgia (pop. 3,869), a community adjacent to the southern boundary of Chattanooga, Tennessee (population 119,082). He operates on 980 kc, 500w, directional, daytime. Rossville has no broadcast stations other than WRIP–AM and FM. Chattanooga, to which he proposes to move on 1190 kc, 50 kw, directional, daytime, has 6 AM, 5 FM and 5 TV stations. The proposed change in the facilities of WRIP would result as follows:

Contour	Present		Proposed	
	Population	Area (sq. mi.)	Population	Area (sq. mi.)
0.5 mv/m	299,500	1,240	478,900	5,640
Interference-free	299,150	1,216	478,900	5,640
Gain			181,540	4,487
Loss			1,790	63
Net gain			179,750	4,424

Between 2 and 17 other AM services are available throughout the gain area. The area receiving only 2 AM services includes 227 persons in 19 sq. mi.; the area receiving 3 such services includes 923 persons in 48 sq. mi.; and the area receiving four such services includes 3,665 persons in 132 sq. mi. If FM services are included between 3 and 23 aural services are now available throughout the gain area. The area receiving 3 such services includes 284 persons in 18 sq. mi., and the area now receiving only 4 aural services contains 749 persons in 24 sq. mi. Within the loss area a minimum of 7 AM and 13 aural services are available.

18. However, one additional element of loss must be considered. WRIP's present allocation permits operation commencing at 6:00 a.m. local time, but its proposed facilities would not be allowed pre-sunrise operation. As a result, the station's signal would be lost to those now being served during the following periods:

Month	Hours lost each day	Percent of broadcast day lost	Month	Hours lost each day	Percent of broadcast day lost
January	1.75	14.9	July	.50	3.3
February	1.50	12.0	August	1.00	6.9
March	1.00	7.9	September	1.50	10.9
April	.25	1.9	October	1.75	13.2
May	.75	5.2	November	1.15	10.9
June	.50	3.3	December	1.75	15.4

ISSUE NO. 9:307(B)

19. As heretofore noted, Rossville, Georgia, where WRIP is now located, adjoins the southern boundary of Chattanooga, Tennessee, where Sadow proposes to move it. Rossville is in Walker County (population 50,691). Chattanooga is the seat of Hamilton County (population 254,236), and the central city of the Chattanooga Standard Metropolitan Statistical Area comprised of Hamilton and Walker Counties.

20. Rossville contains an area of 1.53 sq. mi. Its business district is a continuation of a commercial development within Chattanooga, and its businessmen participate in the Greater Chattanooga Chamber of Commerce. Rossville does not have separate electrical, gas, water, or sewage facilities, nor does it have its own newspaper. However, it does elect a Mayor and Commissioners, and has its own police force and volunteer fire department. Political and governmental activities

are, of course, conducted by the State of Georgia or its subdivisions rather than by Chattanooga or other Tennessee entities. Rossville runs its own parks and recreational facilities, has two banks unaffiliated with those in Chattanooga, and contains several industrial plants. The Rossville government participates in the Chattanooga Area Regional Council of Governments, a group formed to foster cooperation and coordination among members with respect to matters regional in scope.

21. The advertising pattern of WRIP suggests that the station has more than local appeal. During the period January–October, 1970, the source of the station's commercial spot announcements was: national, 9.6%; regional, 69.9%; Chattanooga, 16.3%; and Rossville, 4.4%. If the station is moved it will continue to provide a city grade signal over all of Rossville. The proposed program schedule contemplates continuation of the local Rossville programs currently broadcast and a local inter-connection would be established between the proposed AM studios and the FM studios which would remain at the present Rossville AM–FM location. The station would continue to carry Rossville PSA's on the same basis as they are presently broadcast.

ISSUE NO. 10: COMPARATIVE

22. Station WRIP is licensed to Col. Jay Sadow as a sole proprietor. He has been and will continue to be the full-time chief executive of the station. His wife also devotes her full time to the management of the broadcast operation. In addition to WRIP–AM, Col. Sadow is the licensee of WRIP–FM in Rossville, and owner of WRIP, Inc., permittee of WRIP–TV, Chattanooga, Tennessee, a station which is nearing the completion of construction. Col. and Mrs. Sadow have devoted their attention to broadcasting since they put WRIP on the air in 1958, and each has displayed a pattern of active participation in local civic, cultural, business and religious organizations.

23. Rock City Broadcasting, Inc. is a wholly owned subsidiary of Rock City Gardens, Inc. The principals of these corporations are:

Rock City Broadcasting, Inc.	*Rock City Gardens, Inc.*
E. Y. Chapin III—President, Treasurer, Director	President, Treasurer, Director and 63 percent stockholder.
E. Y. Chapin IV—Vice President and Director.	
E. Y. Chapin Jr.—Director	Vice President, Director and 4.6 percent stockholder.
Anna Powers	Secretary, Director and 21.2 percent stockholder.
Don Gault	Director and 10.6 percent stockholder.

Rock City Broadcasting, Inc. is the licensee of Station WLOM–FM, Chattanooga, Tennessee. Neither the corporations nor their principals have any other broadcast interests.

24. E. Y. Chapin IV would be general manager of the proposed station devoting his full time thereto. His father, E. Y. Chapin III plans to devote 10–20 hours a week to the station during its construction and initial period of operation, and he would remain in daily consultation with his son. However, the record does not define the precise duties he would undertake other than the acceptance of joint responsibility with his son for "basic decisions".

25. Both father and son are active in community organizations in the Chattanooga area. For the past three years the younger Chapin has served as General Manager of Station WLOM–FM. No other Rock City principal plans to participate in the operation of the proposed station.

ISSUE NO. 11: COMPARATIVE PROGRAMMING

26. Sadow's community surveys revealed that many area residents are interested in religious activities. From such interest he inferred a need for religious programs, both in the sense of programs dealing with religious concepts and practices, and in the sense of the application of religious principals to contemporary problems. WRIP is now the only station in the Chattanooga area with a primarily religious format, and it proposes, in essence, to continue its existing programming emphasis. However, the record indicates that other stations in the area do carry varying amounts of religious programs, and there is no reason to believe that will not continue to do so.

27. Rock City's surveys, on the other hand, disclosed an interest in and reliance on radio for news dissemination, and for discussion of community problems. Since no other station in the Chattanooga area has a basically news and public affairs format, Rock City devised a format which emphasizes such programming. Fundamentally, it involves twenty minute cycles during morning and evening drive time, each cycle consisting of four minutes of national news, four minutes of regional news, four minutes of local news, four minutes of public affairs, and four minutes of features and PSA's. During other parts of the day and on weekends when audience turnover is less rapid, the segments would be of 15 minute duration, and religious and sports programs would be introduced.

Conclusions

ISSUE NO. 1: SADOW'S COMMUNITY NEEDS SURVEY ACTIVITIES

28. Both the number of persons and their group identification included in the Sadow surveys indicate that he has obtained the views of a representative cross-section of the population he proposes to serve. His survey techniques were in substantial compliance with the governing Commission pronouncements. His programming seems reasonably designed to meet the needs he believes that his surveys reveal. While Rock City suggests that his failure to materially change his programming proposal demonstrates that his programming was predetermined and unaffected by his surveys, the Examiner is unable to reach any such conclusion. Col. Sadow, based on long residence in the area and experience as a local broadcaster, believed that a need existed for a station oriented toward religion. His surveys, in his reasonable opinion, confirmed that belief. Under such circumstances, his failure

to materially alter his programming proposal warrants no adverse inference.

ISSUE NO. 2: FINANCIAL QUALIFICATIONS

29. Sadow will need $220,175 to construct his modified AM facilities and to operate the AM and FM stations for a year. The combined operation has over the last four years, presented a picture of steadily increasing revenues and profits. Since the modified AM operation would continue to provide service to substantially all of the population now served, it is reasonable to assume that revenues will not diminish.[8] Therefore, crediting Sadow with the $182,160 in revenues generated in 1970, he will need approximately $38,000 in other assets to finance his proposal. His cash and life insurance cash value alone exceed that sum without affording consideration to his other liquid or easily liquifiable assets.

30. Rock City will need $230,000 to build and operate its proposed station for a year. It relies upon an equipment credit of $30,000, and a bank loan of $220,000. This reliance appears to be well placed. Although the applicant already owes $60,000 to the bank which is proposed as the source of the $220,000 loan, the bank's commitment is for an additional $220,000. This is tantamount to a statement by the bank that it will not look to the new loan as a source of repayment on the old note, and that the entire proceeds of the new loan will be available for the proposed AM station. It is concluded that each applicant has demonstrated adequate financial qualifications.

ISSUES NO. 3–5: ENGINEERING

31. Rock City has demonstrated that its antenna pattern will be as specified in its application, and that the transmitter site shown in its application is correct. While there are water tanks in the vicinity of the Rock City site which might cause reradiation, they can be detuned. The cost would not materially affect the applicant's financial qualifications, and the owners of the structures have consented to detuning.

ISSUE NO. 6: RULE 73.188(B)(2)

32. Sadow would provide a 5 mv/m or greater signal to over 97% of the population and 91% of the area of Chattanooga. Rock City would provide such a signal to over 99% of the population and 97% of the area of the city. Each is inhibited from providing full coverage by terrain, protection and land availability problems. Under such circumstances it is concluded that both applicants are in substantial compliance with the rule, *Broadcasting, Inc.*, 17 RR 2d 1117.

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[8] Very substantial new populations will be served by the operation as proposed, but hours of operation will be somewhat reduced. The record contains no reasoned projections as to the probable consequences of these two facts, but it seems probable that they will tend to offset each other. That is to say, a larger potential audience will probably result in a larger actual audience justifying higher advertising rates. However, with a shorter broadcast day there will be fewer advertising availabilities to sell.

ISSUES NO. 7, 8 AND 9: AREAS AND POPULATIONS AND 307(B)

33. Rock City would bring a new service to substantially greater populations than would Sadow. Moreover, Sadow's proposal would result in a total loss of service to a small number of persons (1,790), and part time loss of service ranging, depending upon the time of year, from 15 minutes to 1 hour and 45 minutes daily to all the population now served. Hence, it is concluded that Rock City's proposal represents a more efficient allocation of the frequency in terms of the greatest net gain of service to the greatest number of persons. However, virtually all of the populations involved receive an abundance of other services, and the weight to be accorded this preference is materially reduced.

34. In meeting the issue as to the 307(b) implications of moving his station from Rossville to Chattanooga Sadow notes that Rossville would not lose a reception service since his proposal would continue to provide a city grade signal over the community. Moreover, he contends the city would not lose a transmission service because he has committed himself to continue to offer the same Rossville oriented programming he has in the past, and to supply an interconnection from the FM studios which would remain located in Rossville. However, these arguments fly in the face of many of years of Commission precedent.

35. Since its inception the Commission has encouraged the establishment and maintenance of broadcast service in as many of the nation's communities as possible. This policy has been based on the assumption that each community has its own interests and problems to which a local station can direct its attention.[9] Subsidiary policies have been established to enhance the likelihood that local stations will actually meet local needs. If Sadow is permitted to move his station to Chattanooga, the thrust of all of the Commission's policies will compel him to serve Chattanooga with service to Rossville being relegated to a secondary status. Thus, no matter how good Sadow's intentions, Rossville will, in fact, have lost its only AM transmission service. Since no overriding needs of Chattanooga for Sadow's proposed service has been shown,[10] it is concluded that the objectives of Section 307(b) would be disserved by a grant of Sadow's instant application.

ISSUES NO. 10 AND 11: COMPARATIVE

36. An adverse conclusion on the 307(b) issue having been reached with respect to the Sadow application, the comparative issues have become moot and no conclusions thereon will be formulated.

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[9] Sadow's proposed findings seem to imply that Rossville may not actually be a separate community relative to Chattanooga. The Examiner is unable to adopt this view. Not only does the city have all the municipal indicia, and more, of population centers which the Commission has held in other hearings to constitute communities within the contemplation of Section 307(b), Sadow himself has repeatedly asserted that Rossville is a separate community by the filing of his various applications for WRIP–AM and FM at that locality.

[10] Sadow's proposed findings suggest that Section 307(b) should be applied to his application as if it were to be a regional or metro station. However, the application has been filed and prosecuted as one for the city of Chattanooga, and it is on that basis that it must be judged.

SUMMARY

37. Each of the applicants has been found to have met the issues going to basic qualifications. However, it has been concluded that Sadow's proposal to transform Rossville's only standard broadcast station into a Chattanooga station is contrary to the intention of Section 307(b) of the Communications Act. Thus, Sadow's application must be denied, and there is no further barrier to a grant of the Rock City application. Rock City having been found to be fully qualified, the public interest would be served by a grant of the application.

Accordingly, IT IS ORDERED, That, unless an appeal is taken to the Commission by a party or the Commission reviews the Initial Decision on its own motion pursuant to Rule 1.276, the application of Jay Sadow IS DENIED, and the application of Rock City Broadcasting, Inc. IS GRANTED.

CHESTER F. NAUMOWICZ, Jr.,
Hearing Examiner,
Federal Communications Commission.

F.C.C. 73–157

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of: TELEMUNDO, INC. (W22AB), MAYAGUEZ, P.R. For Construction Permit for New UHF Television Translator Station	File No. BPTT–2452

MEMORANDUM OPINION AND ORDER

(Adopted February 7, 1973; Released February 13, 1973)

BY THE COMMISSION: COMMISSIONER H. REX LEE ABSENT.

1. The Commission has before it for consideration the above-captioned application of Telemundo, Inc., licensee of television station WKAQ–TV, channel 2, San Juan, Puerto Rico, for a construction permit for a new 1,000-watt UHF television broadcast translator station to serve Mayaguez, Puerto Rico, by rebroadcasting station WKAQ–TV on output channel 22, which is listed in the Television Table of Assignments (section 73.606(b) of the rules). The Commission also has before it for consideration a petition to deny, filed December 6, 1972, by Video Empresas Del Oeste, Inc., permittee of newly authorized UHF station WVEO, channel 44, Aguadilla, Puerto Rico; a petition to deny, filed December 7, 1972, by Quality Telecasting Corporation, licensee of station WORA–TV, channel 5, Mayaguez, Puerto Rico; and various pleadings filed in connection therewith.[1] The petition to deny filed by Video Empresas Del Oeste, Inc. (VEO), is not supported by an affidavit of a person with personal knowledge of the facts alleged therein, as required by section 309(d)(1) of the Communications Act of 1934, as amended, and it is not, therefore, acceptable as a statutory petition to deny. Since we are considering this matter on its merits in any event, we will accept the petition as an informal objection filed pursuant to section 1.587 of the Commission's rules.

2. Quality Telecasting Corporation (Quality) claims standing as a party in interest within the meaning of section 309(d) of the Communications Act on the basis that it will compete in Mayaguez for viewership with the proposed translator station and will suffer economic injury. We find that petitioner has standing. *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 60 S. Ct. 693, 9 RR 2008.

3. The applicant is presently operating a 100-watt UHF translator in Mayaguez pursuant to Special Temporary Authority granted by the Commission on November 15, 1972 (*Telemundo, Inc.*, FCC 72–1023, released November 21, 1972), reconsideration denied, FCC 73–61, released January 24, 1973. The background and history of this proceed-

[1] On December 21, 1972, the applicant filed separate oppositions to the petitions to deny and Quality Telecasting filed its reply thereto on January 4, 1973.

ing are set forth in the two cited prior decisions and in an order in this same proceeding (FCC–1109, released December 14, 1972) in which we denied a stay of our grant of STA. We will not, therefore, repeat the circumstances leading to our authorization of station W22AB on a temporary basis.

4. Station WVEO was authorized to VEO in September 1972, to operate on channel 44 in Aguadilla, but it has not yet been constructed and, to our knowledge, construction has not yet commenced. VEO's objections are based on its fear that the translator will make it impossible for the fledgling UHF television station to survive and compete. It also contends that the applicant has not shown a need for the proposed translator. At the outset, we note that the proposed translator will serve Mayaguez, but not Aguadilla. The proposal entails a highly directionalized antenna oriented at 142 degrees true, toward Mayaguez and away from Aguadilla, with effective radiated visual power of slightly more than 33 kW. Aguadilla is approximately 15 miles north of Mayaguez and, under these conditions, it is virtually impossible for the translator's signals to be received in Aguadilla. Mayaguez is within the predicted principal city contour of station WVEO. With respect to the question of need for the translator, VEO has misconstrued the thrust of *Doubleday Broadcasting Company, Inc.*, 25 FCC 2d 871, 20 RR 2d 467, and *Newhouse Broadcasting Corp.*, 8 FCC 2d 1122, 10 RR 2d 937, which the objector cites for the proposition that "when local stations object to applications for translators in their service areas, the burden is on the applicant to show a need for the proposed translators." This is not the teaching of the cited cases, but rather that the objector has an affirmative obligation to make at least a *prima facie* showing of lack of need before the burden to show need is placed upon the applicant. VEO has made no such showing. VEO has not shown how operation of the translator station will injure the public interest, even assuming that there might be some economic injury to station WVEO. The objections will be denied.

5. In considering Quality's petition to deny as well as VEO's objections, we wish to emphasize that we are mindful of the fact that, with the exception of a period of approximately one year in 1970, WKAQ–TV's programming was provided to Mayaguez through diverse means for 15 years and it is, therefore, a continuation of an existing service which we are considering and not the introduction of a new service. VEO's argument of economic injury loses much of its luster when viewed in the light of the fact that it applied for a construction permit for its Aguadilla station and asserted financial ability to build and operate for a year in the face of the existence of WKAQ–TV's programming being carried in Mayaguez by station WMGZ–TV. WMGZ–TV looked to local advertising revenues for at least some financial support; the translator will not. Moreover, the area which will be served by the translator within station WVEO's predicted Grade B contour will be substantially less than that served by station WMGZ–TV. The translator is to operate on a channel which is listed in the Television Table of Assignments (section 73.606(b) of the rules) for use by a regular television station and the translator's role, therefore, is secondary to that of any television station which we may subsequently authorize to operate on channel 22 in Mayaguez. The

translator, in other words, can be "bumped". This was not true with respect to station WMGZ–TV. For all of these reasons, it seems to us that the translator represents a reduction of potential adverse economic impact rather than an aggravation.

6. Because of the fact that the translator proposal represents continuation of an existing service, we are not persuaded, as argued by Quality, that the translator is an interloper which will disrupt the traditional structure and arrangements for television service on Puerto Rico's west coast. Quality seems to concede that we are not confronted with a new service, for, in its petition to deny, it refers to the "* * * reintroduction of the signal of WKAQ–TV * * * into Mayaguez via the proposed Telemundo translator * * *." There is no claim that the translator will generate local advertising revenues nor that, by reason of the translator, Telemundo will solicit advertising beyond that which it would have solicited had the arrangements with station WMGZ–TV continued. Of major importance in our evaluation of Quality's pleadings is the fact that Quality states categorically that it does not plead a *Carroll* question;[2] Station WORA–TV is a profitable operation and petitioner has not shown that its profitability will be impaired, much less that the public interest would be adversely affected. It is well established that private economic injury to a station, absent concomitant injury to the public interest, is not a ground for denying an application for a new broadcast station. *Folkways Broadcasting Company, Inc.* v. *Federal Communications Commission*, 126 U.S. App. D.C. 123, 275 F 2d. 299, 8 RR 2d 2089.

7. Quality asserts that the translator would have an adverse impact on the new Aguadilla UHF station, but, as with VEO's own pleading, it has failed to support this assertion with specific allegations of fact. We hold, therefore, that the allegations of adverse impact on station WVEO do not warrant unfavorable action on the application. Petitioner claims that the Commission has, in other cases, refused to grant the application of a television station licensee for a new UHF translator to operate in the city of license of a new UHF television station and it cites *WBJA–TV, Inc.*, 14 FCC 2d 262, 13 RR 2d 1138, and *West Michigan Telecasters, Inc.*, 11 FCC 2d 549, 12 RR 2d 133, to support this position. The cited cases, however, make clear that the Commission was there concerned only with a situation where the proposed new UHF translator would duplicate the network programming proposed by the new UHF television station, thereby imperiling the prospects for the new UHF television station to obtain the network affiliation it was seeking. The cited cases are inapposite.

8. Petitioner alleges that grant of the translator application would result in a concentration of control of the means of mass communications by Telemundo. To support this contention, petitioner points to the fact that Telemundo and related companies own or control a standard radio station, an FM station, and a television station in San Juan, and publish *El Mundo*, a large daily newspaper of general circulation throughout the island. Telemundo also controls Telemundo CATV, Inc., franchisee of a cable television system in Ponce. Petitioner, however, has not shown how authorization of a translator in Mayaguez

[2] *Carroll Broadcasting Co.* v. *Federal Communications Commission*, 103 U.S. App. D.C. 346, 258 F 2d. 440, 17 RR 2066.

would result in a concentration of control or, in fact, cause any significant change in the *status quo* prior to the demise of station WMGZ–TV. Moreover, we think that this contention is irreconcilable with the generally agreed fact that the island is served with a multitude of radio signals of every nature.[3] In the area to be served by the translator, the signals of two VHF television stations can now be received and, when station WVEO is built, there will be a third television signal available. Aside from *El Mundo*, there are at least three daily newspapers of general circulation in the area, five standard radio stations, and four FM radio stations, all serving Mayaguez. Neither Telemundo nor its principals have any interest in any of these. We conclude that petitioner has not sustained its allegations with factual support.[4]

9. Finally, in our view, it would be the discontinuation of WKAQ–TV's programming service in Mayaguez which could cause injury to the public interest, and not the continuation of that service, for it is axiomatic that a curtailment of radio service is not in the public interest unless it is offset by concomitant factors. *Hall* v. *Federal Communications Commission*, 99 U.S. App. D.C. 86, 237 F 2d. 567, 14 RR 2009. No offsetting factors have been alleged and we find none. It is undisputed that the San Juan television stations, including WKAQ–TV, formulate their programming to meet the needs and interests of the entire island and, clearly, events transpiring in the Commonwealth's capital and government are of interest to Mayaguez as well as to the rest of the island. Nothing in the pleadings before us persuades us that grant of the application could adversely affect the public interest. We conclude, therefore, that the petitioner and the objector have raised no substantial or material questions of fact and we find that the applicant is qualified to construct, own and operate the proposed new station. We further find that a grant of the application, appropriately conditioned, would serve the public interest, convenience and necessity.[5]

Accordingly, IT IS ORDERED, That the petition to deny filed herein by Video Empresas Del Oeste, Inc., IS DISMISSED, and, considered as an informal objection filed pursuant to section 1.587 of the Commission's rules, IS DENIED.

IT IS FURTHER ORDERED, That the petition to deny filed herein by Quality Telecasting Corporation, IS DENIED, and the above-captioned application of Telemundo, Inc., IS GRANTED, in accordance with specifications to be issued.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[3] In a letter dated September 10, 1970, to the Commission from Mr. Alfredo R. de Arellano, Jr., president of Quality Telecasting, Mr. de Arellano states that he believes "* * * we have more TV stations in 3,500 sq miles of territory, for 2,750,000 people than any other place in the world."

[4] Telemundo is in full compliance with the Commission's present multiple-ownership rules and, since translators are not counted as stations for the purposes of the multiple-ownership rules, this situation will be unaffected. Section 74.732(b) of the rules. Our review of the competitive situation on the island makes it obvious that there is no merit to petitioner's claim. See *Chuck Stone* v. *Federal Communications Commission*, — U.S. App. D.C. —, 466 F 2d. 316, 24 RR 2d 2105.

[5] Since no type-accepted equipment is available for 1,000-watt translators with an input from a translator microwave relay station, grant will be conditioned upon submission of data in accordance with section 74.750 of the rules, prior to licensing.

F.C.C. 73-189

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re	
TRI-COUNTY CABLE TELEVISION CO., INC., WENONA, ILL.	CAC-895 IL156
TRI-COUNTY CABLE TELEVISION CO., INC., TOLUCA, ILL.	CAC-896 IL157
TRI-COUNTY CABLE TELEVISION CO., INC., MINONK, ILL.	CAC-897 IL158
For Certificates of Compliance	

MEMORANDUM OPINION AND ORDER

(Adopted February 14, 1973; Released February 22, 1973)

BY THE COMMISSION: COMMISSIONERS JOHNSON, H. REX LEE, AND WILEY CONCURRING IN THE RESULT; COMMISSIONER REID, ABSENT.

1. On July 25, 1972, Tri-County Cable Television Company, Incorporated filed the above-captioned applications for certificates of compliance for new 20 channel cable television systems to operate from a common headend at Wenona, Minonk, and Toluca, Illinois, in the Peoria, Illinois, television market (83d). Tri-County proposes to carry on each of its systems the following Illinois television signals: WRAU-TV (ABC), WEEK-TV (NBC), WMBD-TV (CBS), and WTVP (Educ.), Peoria; and WGN-TV (Ind.), and WFLD-TV (Ind.) both Chicago. On September 18, 1972, Midwest Television, Inc., licensee of Station WMBD-TV, Peoria, Illinois, filed an objection to Tri-County's applications, and Tri-County has replied.

2. In its objection, Midwest alleges: (a) that Tri-County's franchises are not consistent with Section 76.31 of the Commission's Rules since (1) there are no franchise recitations that they result from a full public proceeding, (2) there are no construction timetables, (3) they are for twenty-five years, (4) they make no provision for investigation and resolution of complaints, (5) no initial fee schedule is provided in the franchises, (6) there is no provision for incorporation of Commission standards in the franchises, (7) there are no franchise fees stated in the franchises; (b) that Tri-County makes too vague a statement regarding access availability; (c) that no statement is made concerning compliance with Equal Employment Opportunity requirements; and (d) that no statement is made guaranteeing Tri-County will provide network or syndicated program exclusivity.

3. We rule on Midwest's objections as follows: (a) Tri-County avers (1) that it received its franchises only after its qualifications were discussed at City Council meetings in each city; (2) that it will complete construction within one year of grant of the certificates; (3)

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that its franchises were granted prior to the adoption of the Commission's present rules and, therefore, are eligible for consideration under the substantial compliance test [1]; (4) that a local office has been established at Wenona and will handle complaints; (5) that the city councils have been given the initial rates and increases will be subject to their approval; (6) that Tri-County will accept any Commission modifications; and (7) that Tri-County does not have to pay any franchise fees to the cities. In these circumstances, we believe that there has been substantial compliance with our franchise standards sufficient to justifiy a grant until March 31, 1977. *CATV of Rockford, Inc.*, FCC 72–1005, 38 FCC 2d 10; *LVO Cable of Shreveport-Bossier City*, FCC 72–954, 37 FCC 2d 1037. (b) In its reply, Tri-County sets forth its access channel plans in acceptable form.[2] E.g. *Viking Media Corporation*, FCC 72–875, 37 FCC 2d 605, 606. (c) Tri-County states it will employ fewer than five full-time employees and hence is not subject to the requirement. In addition, Tri-County has submitted an equal employment statement. (d) In its reply, Tri-County states it will comply with appropriate exclusivity requests.

In view of the foregoing, the Commission finds a grant of the above-captioned applications would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Objection of Midwest Television, Inc. Pursuant to Section 76.27" filed September 8, 1972, IS DENIED.

IT IS FURTHER ORDERED, That the applications for certificates of compliance (CAC–895, CAC–896, CAC–897) filed July 25, 1972, by Tri-County Cable Television Company, Incorporated, for Wenona, Toluca, Minonk, Illinois ARE GRANTED, and appropriate certificates of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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[1] The Wenona franchise was granted July 7, 1971; the Minonk franchise was granted September 7, 1971; and the Toluca franchise was granted August 2, 1971.

[2] Only Minonk and Toluca are within Peoria's specified zone and therefore subject to access requirements.

F.C.C. 73–153

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of THE TWIN STATES BROADCASTING CO., ASSIGNOR and CSRA BROADCASTERS, INC., ASSIGNEE and THE WARNER GROUP, INC., ASSIGNEE For Assignment of License of Station WFNL, North Augusta, S.C. and WGAC, Augusta, Ga.	BAL–7596 and BAL–7597

FEBRUARY 7, 1973.

MR. GEORGE G. BEASLEY,
President, CSRA Broadcasters, Inc.,
Post Office Box 3286,
Augusta, Ga. 30904.

DEAR MR. BEASLEY: This is with reference to the applications (1) for assignment of the license of Station WGAC, Augusta, Georgia, from The Twin States Broadcasting Company to CSRA Broadcasters, Inc. (BAL–7596) and (2) for assignment of the license of Station WFNL, North Augusta, South Carolina, from CSRA Broadcasters, Inc. to The Warner Group, Inc. (BAL–7597).

In connection with its review of the above applications, the Commission considered the fact that the Complaints and Compliance Division of its Broadcast Bureau is currently conducting an investigation into possible licensee misconduct which may have occurred at Station WFMC, Goldsboro, North Carolina, which you control. The Commission also considered the cross-interest problem which would be raised by the fact that, as a result of the above applications, CSRA Broadcasters, Inc. would be licensee of WGAC and a creditor of the licensee of WFNL, which is in the same market. You have represented that the note which is to be received from The Warner Group, Inc. would be discounted to a disinterested, *bona fide* third party in order to obviate this problem.

In view of the above, please be advised that the Commission has granted the above applications: (1) subject to the outcome of the WFMC investigation and (2) on the condition that The Warner Group note be discounted prior to consummation of the WGAC application, BAL–7596.

Commissioner Johnson dissenting and issuing a statement. Commissioner H. Rex Lee absent.

BY DIRECTION OF THE COMMISSION,
BEN F. WAPLE, *Secretary.*

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

Today the Federal Communications Commission grants authority to CSRA Broadcasters, Inc., to rid itself of one standard broadcast station (WFNL, North Augusta, South Carolina) and to purchase another (WGAC, Augusta, Georgia). At least for purely pedagogical purposes, this is a beautifully illustrative decision: it demonstrates graphically—to broadcasters, scholars and legislators alike—how lawlessly this Commission can and does act. Because the majority makes an utter mockery of our rules and of our process, I dissent.

The majority recognizes that these assignments pose some problems. The majority's resolution of those problems raises serious questions. But the decision is probably most remarkable for what it completely ignores.

First, the majority approves CSRA Broadcasters' right to purchase a new AM radio station despite the fact that CSRA's principals currently own and control a sizeable number of other broadcast interests—all in the Southern portion of this country.

Mr. George G. Beasley currently owns a 55% interest in CSRA, the present licensee of WFNL. Beasley also owns majority interests in five other standard broadcast stations: WFMC, Goldsboro, North Carolina; WASC, Spartansburg, South Carolina; WMOO, Mobile, Alabama; WFAI, Fayetteville, North Carolina; and WANC, Henderson, North Carolina. He also owns a 35% interest in an additional AM station, WKGX, Lenoir, North Carolina; is majority owner of two FM stations, WFMC–FM and WHNC–FM; and has a 51% interest in a pending FM application for Mobile, Alabama. Including his ownership interest in WFNL, then, Mr. Beasley has substantial interests in seven AM stations, two FM's, and one potential FM station—all located in the same region of the country.

Mr. Sammy E. Floyd currently owns 10% of CSRA. He also owns a greater than 1% interest in four other AM stations, one FM station, and the pending Mobile FM application. (All of these stations are currently controlled by Mr. Beasley.) Mr. Edward J. McKeown, 10% owner of CSRA, also owns more than 1% of three AM stations and the pending Mobile FM application. Mr. D. E. Gwaltney, owner of 25% of CSRA, also owns well over 1% of two AM stations and 10% of the pending Mobile FM application. Mr. Beasley's wife, Shirley who is vice-president and director of CSRA, is also an officer in several of the stations owned by her husband, McKeown, Floyd, and Gwaltney.

In effect, then, the assignment the majority today approves will leave the owners of CSRA with well over a majority interest in seven AM stations, and two (and soon three) FM stations.[1] It might be observed, of course, that CSRA's principals already own this number of stations (if WFNL is included) and, hence, by replacing WFNL with WGAC, it could be argued that CSRA's principals are merely maintaining the status quo. However, that is not the case because

[1] It is, of course, conceivable that the Federal Communications Commission will refuse to approve the pending Mobile FM application. However, given today's decision, such a possibility seems—if not hilarious—at least highly unlikely.

WFNL is a 500 watt day time-only station serving the small North Augusta Community, while WGAC is a 5,000 watt, full time station serving the entire Augusta metropolis. As the majority itself concedes, WGAC "is a vastly superior facility to WFNL." Thus, by this assignment, the CSRA principals are obviously *increasing* their broadcast interests and influence.

Though the majority alludes to these ownership patterns, it does not even pause to note that such patterns raise very serious multiple ownership problems under our rules and decisions.

In order to prevent the growth of monolithic control over the nation's airwaves—and access to the minds of the audience—the Federal Communications Commission has promulgated rules which limit the number of television and radio stations which may be controlled by the same institutions or individuals. Thus, 47 C.F.R. § 73.35(b) bars an individual or institution from owning a greater than 1% interest in more than one AM station if such ownership would result in an "undue concentration of control" contrary to the public interest; 47 C.F.R. § 73.240(a)(2) applies the same prohibition to FM stations.

In determining whether the grant of a license will result in such an undue concentration of control, the rules require the Commission to consider "the facts of each case." But, in no event do these rules permit an individual or institution to own a greater than 1% interest in more than seven AM's and seven FM's.

As I have suggested on at least two prior occasions, *see* my dissenting opinions in *Application of Cosmos Broadcasting Co.*, — FCC 2d — (1972), and *Application of Muskegon Heights Broadcasting Co.*, — FCC 2d — (1973), the intent of these rules is clear: While the seven station limit is an absolute, or *per se*, maximum, acquisition of any additions to one AM or FM station obviously merits careful Commission scrutiny. Indeed, if the FCC is to consider the "facts of each case" as our rules clearly demand, a hearing might well be warranted in every case where an institution or individual seeks to acquire an additional AM or FM station. (The same rule applies to the acquisition of television stations. (See 47 C.F.R. § 73.636 and *Cosmos Broadcasting*, *supra*.)

As I have also suggested on prior occasions, even if such a hearing is not deemed necessary in the general case—for reasons which can only be termed politically expedient—a hearing is surely required where, as here, an acquisition results in increased *regional* concentration of control. *See Cosmos Broadcasting*, *supra; Muskegon Heights Broadcasting*, *supra*. *See also* my dissent in *Assignment of Station WNUL*, 21 RR 2d 77 (1971).

The majority does not allude to this problem of regional concentration.[2] Shockingly, the majority does not even recognize the broader

[2] It is important to distinguish between undue regional concentration and cross-ownership of overlapping stations. Both are prohibited by our rules, but in the former case an individual or institution owns or controls stations whose signals do not overlap but, nevertheless, cover the same general geographic region of the country. In the latter case, an individual or institution owns stations so close together that their signals overlap—thus reaching the same viewers or listeners. The majority notes that CSRA cannot own both WGAC and WFNL because such ownership would result in the sort of signal overlap precluded by our rules against cross-ownership. The majority, however, does not even speak to the related and equally serious problem of undue regional concentration.

problem of undue concentration posed by these assignments. It is one thing to recognize a problem and then to attempt to resolve it in a disingenuous fashion. It is quite another thing simply to ignore the problem. In the former case, our rules suffer from gross mis-reading—surely a serious difficulty. But in the latter case, our *process* suffers from cruel insult and from what can only be termed lawlessness.

The second problem raised by these assignments—and again completely ignored by the majority—lies in CSRA's efforts at ascertaining the needs of the Augusta community.

Before this Commission can grant an application to acquire a station's license, we must first find that such assignment serves the public interest, convenience and necessity. *See* § 309 of the Communications Act of 1934. And, in making this determination the Commission must find that the applicant has adequately ascertained the needs of its community. *See, e.g., Sioux Empire Broadcasting Co.*, 16 FCC 2d 995 (1969); *Application of City of Camden*, 18 FCC 2d 412 (1969); *Stone* v. *Federal Communications Commission*, 24 RR 2d 2105, — F. 2d — (D.C. Cir. 1972).

Based on CSRA's own demographic study, 50% of Augusta's population of 60,000 is black. In conducting its ascertainment of the general population, CSRA consulted with 160 individuals, 23 of whom were black. In other words, though 50% of Augusta is black, only 14% of those persons consulted from the general public were black. While the Commission has stated in its *Primer on Ascertainment* that "statistical accuracy is not required" in this area, 27 FCC 2d 650, 667 (1971), this does not mean that a licensee can virtually ignore significant groups in its community. *See Application of City of Camden, supra.* Indeed, our *Primer on Ascertainment* requires that the applicant consult with a random sample of its community, and the fact that CSRA consulted with so small a percentage of blacks in such a heavily black-populated city strongly suggests that the applicant's ascertainment study may not have been based upon a random sample.

The majority completely ignores this possible defect in the applicant's ascertainment study. Presumably, the majority is of the view that because no complaint has been officially leveled against this ascertainment survey, there is no reason for FCC exploration. However, as I have observed in the past, if this Commission is serious about injecting integrity into its own rules, it must accept the obligation of enforcing those rules on its own motion. *See, e.g.*, my dissent in *Application of the Meredith Corporation* (*WOW*), —— FCC 2d —— (1972).

Here, however, the majority reveals that it has no intention of enforcing its own rules, and, in so doing, it robs those rules of their vitality. Not only does it sap its ascertainment requirements of their force, but it also flouts the law as set forth by the United States Court of Appeals by ignoring the problems inherent in CSRA's proposed format change for WGAC.

The assignee plans to change WGAC's format from contemporary, middle-of-the-road music to one of Country and Western combined with "standard pop" and some gospel music. Again, the majority makes nothing of this fact, presumably because it does not appear that

any citizens have objected. It is, of course, possible that the citizens of Augusta have not been apprised of CSRA's proposed format change. But, irrespective of the reasons for this lack of citizen objection, I believe that this Commission is under an obligation to investigate—on its own—proposed format changes in the context of license assignment proceedings.

In *Citizens Committee* v. *FCC*, 436 F. 2d 263 (D.C. Cir. 1970), the Court of Appeals reversed a Commission grant of an application for a transfer of WKGY–AM–FM in another Georgia city, Atlanta. In that case the Commission had granted the transfer application without a hearing on the question of the public interest impact of the proposed change of format from classical music to a "blending of popular favorites, broadway hits, musical standards, and light classical music." The Court of Appeals held, in substance, that the Commission could not make the necessary factual determinations from the record as developed without a hearing.

A hearing was ordered by the *Citizens* court at least in part to determine whether the licensee would, by changing its format, reduce the degree of programming diversity in the community. *See* my dissenting opinion in *Application of Zenith Radio Corp.*, —— FCC 2d —— (1972). Properly read, such diversity is the key to the *Citizens* decision; if the court were not concerned that the public interest would suffer from such a reduction in diversity, then it would not have been concerned with the Commission's failure to determine the salient facts.

In the instant case, the majority does not ask whether CSRA's proposed format change will decrease the diversity of programming in Augusta. It is at least possible that WGAC's contemporary music format was the only such format in Augusta, and that CSRA's proposed format is identical to the formats of most other stations in the community. It is, of course, equally possible that CSRA's proposed format will actually introduce greater diversity of programming into the Augusta area. The point is that the majority simply does not know and does not bother to inquire. By declining to make such an inquiry the majority ignores the command of the Court of Appeals.

As I have suggested, the majority's refusal even to recognize possible rule violations makes an utter mockery of our process. However, given the majority's treatment of those problems which it *does* perceive, the question whether it is worse to treat our rules disingenuously than it is to ignore them altogether is a close one.

What the majority *does* do is to first grant CSRA a waiver of our three-year rule. 47 C.F.R. § 1.597. That rule precludes a licensee from selling a station within three years of the date the licensee acquired that station. The purpose of the rule is to prevent licensees from "trafficking" in broadcast licenses, from obtaining licenses "for sale rather than for service." *Folkways Broadcasting Co. Inc.*, v. *FCC*, 375 F. 2d 299 (D.C. Cir. 1967). The presumption is that the licensee who sells a station within three years is trafficking, *Harriman Broadcasting Co.* v. *FCC*, 399 F. 2d 569 (D.C. Cir. 1968), and by such trafficking, the licensee serves personal profits over and above the public interest. *See*, *e.g.*, *Harriman Broadcasting Co.* (*WXXL*), 9 FCC 2d 731 (1967).

Section 1.597 therefore demands that this Commission designate for hearing all applications to assign station licenses prior to the expiration of the three-year limit. In the instant case, the majority not only resolves the trafficking question in the licensee's favor absent a hearing, but—more remarkably—it does so in the face of evidence strongly suggesting the presence of the very evil the three-year rule is designed to prevent.

The majority concedes that within the last couple of years CSRA's primary stockholder—Mr. George Beasley—has sold three of his broadcast interests, two of which were majority interests. However, the majority contends that these prior sales, when coupled with the instant sale and acquisition, do not present a trafficking issue because CSRA is merely attempting to improve its broadcast facilities in the Augusta area. Yet, the majority admits, at the same time, that CSRA will make a $90,000 profit through the sale of WFNL, and surely the majority must recognize that licensees do not achieve such instant profit through the mere improvement of facilities.

Indeed, this Commission has held that the sale of a station within three years of acquisition will not constitute trafficking *per se* where no profit is made, *Romac Baton Rouge Corp.*, 7 FCC 2d 564 (1967), thus suggesting that the existence of a profitable sale should indicate the likelihood of trafficking. The majority apparently attempts to dismiss that suggestion with the bizarre statement that CSRA will use the profits made on the WFNL sale to help purchase WGAC. I fail to see how that has any relevance at all.

To conclude from these facts—as the majority does—that Mr. Beasley "is a prudent broadcaster" is simply preposterous (unless one is speaking about Beasley's investment acumen). Only one conclusion is possible from these facts, and that is that Mr. Beasley and his colleagues have engaged in conduct (trafficking) which is *prima facie* inconsistent with the public interest. *See Folkways Broadcasting Co., supra; Harriman Broadcasting Co.* v. *FCC*, *supra*. In such circumstances, a hearing must be held under § 309 of the Communications Act of 1934 before the Commission may rule on this assignment. *Compare Stone* v. *FCC*, *supra*. For the majority to waive its three-year rule in these circumstances is—even to one who has witnessed a lot of FCC lawlessness—unbelievable.

The majority also grants these assignments despite the fact that CSRA's basic qualifications as a licensee currently are in grave doubt. CSRA's principals are the principals of, among other stations, WFMC in Goldsboro, North Carolina. WFMC currently is being investigated by this Commission to determine whether that station has over-commercialized and falsified its logs in order to conceal this fact from the FCC. The investigation is also exploring allegations that WFMC has engaged in double billing.

The majority admits that, while the investigation is not yet completed, "WFMC has in fact been logging its commercials at approximately 50% of time actually broadcast." In other words, the facts currently reveal that WFMC's principals have lied to this Commission. And, while the double billing analysis has not been completed, preliminary analysis reveals that WFMC has, indeed, engaged in such

unlawful conduct. The majority apparently wishes to reward such deception by permitting WFMC's principals to profit from the sale of one station (in violation of one rule) and to purchase yet another (in violation of another).

At this stage of the proceedings, with Mr. Beasley's qualifications as a licensee subject to such serious question, the majority's approval of these assignments raises major problems.

First, the majority asserts that because Mr. Beasley's alleged misconduct relates only to WFMC, that misconduct does not reflect upon Beasley's other broadcast holdings, and, hence, there is nothing wrong with allowing him either to profit from the sale of WFNL or to purchase a new, larger station. Such an assertion completely mis-states the law.

In *Friendly Broadcasting Co.*, 35 FCC 2d 84 (1972), the FCC refused to reconsider an earlier order designating two of Friendly's renewal applications for hearing. Friendly had applied to renew its licenses for WJMO (AM) and WLYT (FM), both in Cleveland, Ohio. The Commission ordered a hearing on Friendly's WJMO application because the licensee's qualifications with respect to that station were in serious question due to numerous alleged rule violations and charges of misrepresentation. The Commission also designated a hearing on the FM application, and Friendly argued that since no wrong-doing had been alleged against *that* station, no hearing should be held with respect to it.

The Commission unanimously disagreed with Friendly's argument. We held that, even if the allegations of misconduct related solely to WJMO, those allegations went to Friendly's basic qualifications as a licensee and thus went to its qualifications to hold *any* broadcast license, *See also Vinita Broadcasting Co.*, 30 FCC 2d 458 (1971), where the Commission denied one AM renewal application and declined to issue a construction permit to the licensee for still another station because the licensee's character qualifications had been found severely wanting with respect to a third, unrelated station.

Indeed, just two weeks ago this Commission voted to designate for hearing the renewal application of WOIC, Columbia, South Carolina, at least in part because the licensee's character qualifications had been drawn into serious question with respect to its operation of another, unrelated, station. *Application of WOIC, Inc.*, —— FCC 2d —— (1973).

How can this Commission designate a licensee's renewal application for hearing based on the licensee's alleged conduct with regard to another station at one meeting, and then, just two weeks later, deny that another licensee's conduct with respect to one of its stations is even relevant to that licensee's application to sell another station and to purchase an even larger one?

The two holdings cannot possibly be reconciled. At the very least, given *Friendly Broadcasting*, *Vinita Broadcasting*, and *WOIC, Inc.*, a hearing must be designated in the instant case before the Commission can determine whether CRSA should be allowed to *retain* the license to WFNL—let alone whether CRSA should be allowed to sell that

license at a substantial profit in return for the purchase of a superior broadcast facility.

The majority notes rather gratuitously that CSRA's acquisition of WGAS is granted subject to the outcome of the WFMC investigation. The majority does not state unequivocally—though this is the least it could do—that CSRA will have to divest itself of WGAC if the WFMC investigation proves adverse to that station's principals. Could this be because the majority has no intention of finding against WFMC no matter what the facts reveal?

But perhaps more serious is the fact that by granting today's assignment to CSRA, the majority has, in effect, made a "public interest" determination which cannot possibly be made on this record.

As I have noted earlier, section 309 of the Communications Act of 1934 requires that before we grant an application to purchase a station's license, we first determine that such a grant will serve the public interest, convenience and necessity. That determination cannot possibly be made where—as here—the proposed assignee's character qualifications are open to serious doubt. *See* my dissents in *Application of RKO General*, —— FCC 2d —— (1972), and *Application of Sumter Broadcasting*, —— FCC 2d —— (1973). And, as I have also suggested, the lawlessness of such a grant is by no means cured when that grant is made only conditionally. *See RKO*, *supra*, where I noted that such conditional grants tend to place the Commission in a decidedly non-neutral position in violation of the principles set forth by the Supreme Court in ***Ashbacker Radio Co.*** **v.** ***FCC*****, 326 U.S. 327** (1945).

I dissent because I believe the decision in this case is clearly erroneous. I write at such length because the majority's opinion illustrates so fully how bad things really are at the FCC. For those academicians, researchers and reformers who want another example, here it is.

F.C.C. 73R–82

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of THE U.S. DEPARTMENT OF DEFENSE, COMPLAINANT v. GENERAL TELEPHONE CO. OF THE NORTHWEST, GENERAL TELEPHONE CO. OF CALIFORNIA, GENERAL TELEPHONE CO. OF WISCONSIN, GENERAL TELEPHONE CO. OF FLORIDA, WEST COAST TELEPHONE CO. OF CALIFORNIA, ST. JOSEPH TELEPHONE & TELEGRAPH CO., UNITED TELEPHONE CO. OF THE NORTHWEST, NEVADA TELEPHONE-TELEGRAPH CO., DEFENDANTS AMERICAN TELEPHONE & TELEGRAPH CO., RESPONDENT	Docket No. 18536

MEMORANDUM OPINION AND ORDER

(Adopted February 21, 1973; Released February 23, 1973)

BY THE REVIEW BOARD: BERKEMEYER, PINCOCK, AND KESSLER.

1. On January 2, 1973, the Board released its Decision (38 FCC 2d 803, 26 RR 2d 245) in this proceeding affirming the Initial Decision of the Administrative Law Judge (38 FCC 2d 822). On January 26, 1973, the GTE defendants filed a motion for clarification of ruling,[1] requesting that we clarify our ruling on GTE exception number one.[2] In movant's view, "the ruling as it stands * * * is internally inconsistent, for if the GTE defendants were fully subject to the [Communications Act of 1934, as amended] they would be concurring rather than connecting carriers." The motion will be granted to the extent that the ruling in question is modified to read as follows:

> *Granted* to the extent that the General Telephone Companies of California, Florida and Wisconsin are connecting carriers; *denied* in all other respects since this question has been ruled on in paragraph 9 of the Commission's designation Order (22 FCC

[1] A response to the motion was filed on February 5, 1973, by the Secretary of Defense.

[2] The ruling reads as follows:
Granted to the extent that the GTE defendants are connecting carriers; *denied* in all other respects because all the GTE defendants are fully subject to the provisions of the Communications Act of 1934, as amended.

2d 70) and in our Decision. See also *GTE Service Corporation* v. *FCC*, 2d Cir., Cases Nos. 97, 185–188, February 1, 1973, Slip Opinion, pp. 1817–18.

2. Accordingly, it is ordered, That the motion for clarification of ruling, filed January 26, 1973, by the GTE defendants IS GRANTED to the extent indicated herein and IS DENIED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-131

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications for Renewal of License filed by UNITED TELEPHONE CO. OF OHIO For Radio Common Carrier Stations KQA459 and KQA651 in the Domestic Public Land Mobile Radio Service at Lima, Ohio, and Bellefontaine, Ohio	Docket No. 19072 Files Nos. 548-C2-R-70, 549-C2-R-70

MEMORANDUM OPINION AND ORDER

(Adopted January 31, 1973; Released February 5, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN PART AND DISSENTING IN PART; COMMISSIONERS REID AND WILEY CONCURRING IN THE RESULT.

1. The Commission has under consideration the Initial Decision, FCC 72D-16, of Administrative Law Judge Lenore Ehrig, exceptions thereto and supporting briefs, filed on April 6, 1972, by Carpenter Radio Company (Carpenter), Ohio Association of Radio Common Carriers (Association), and the Chief, Common Carrier Bureau (Bureau), and a reply, filed April 19, 1972, by United Telephone Company of Ohio (United). Carpenter, Association, and the Bureau have requested oral argument before the Commission, *en banc*.

2. The captioned renewal applications were designated for hearing in a Memorandum Opinion and Order, FCC 70-1154, released November 6, 1970, on issues which included *inter alia* the following:

> To determine whether United Telephone Company of Ohio, in connection with the rates charged to miscellaneous common carriers and to others for interconnection with the landline facilities of United, has engaged in any pricing practices which are:
>
> (a) anti-competitive or monopolistic;
>
> (b) in violation of any provision of the Communications Act or contrary to the public interest standards thereof;
>
> (c) in violation of any rule, decision, or policy of the Federal Communications Commission;
>
> and if so, whether the Commission should prescribe just and reasonable interconnection charges, and what such charges should be, pursuant to Section 201(a) of the Act, 47 U.S.C. Section 201(a).

In resolving the designated issue, the Presiding Judge misconstrued the scope of the issue and confined her deliberations to "whether

United is charging a premium for a line to connect a miscellaneous common carrier as distinct from ordinary business lines."

3. In our designation order we noted that Association alleged, *inter alia*, that United was discriminating in its charges to miscellaneous common carriers for interconnection as opposed to ordinary business lines. It was our intention, however, to consider United's interconnection pricing practices fully in order to assure that it was not engaged in any anti-competitive or monopolistic pricing practices. In the designation order we discussed at length our "concern for the possibilities of competitive abuse where wireline carriers compete with non-wireline carriers" (*Guardband Proceeding*, 12 FCC 2d 841 at 845 (1968), *recon. den.* 14 FCC 2d 296, *affirmed sub nom. Radio Relay, Inc.* v. *FCC*, 409 F 2d 322 (2d Cir., 1969)), and we stressed the "great significance we attach to competitive equality between wireline and non-wireline carriers." The guidelines we established in the *Guardband Proceeding* for pricing practices in competitive situations provided that authorizations would be granted on the condition that wireline carriers made their facilities available to competing non-wireline carriers at costs identical to those they use in computing their own costs for providing competitive services. Although the *Guardband Proceeding* is not directly applicable to the applications under consideration here, our discussion illustrated our concern with competition between United and competing non-wireline carriers which use its interconnection facilities. We did not contemplete the narrow framework within which the Presiding Judge interpreted Issue 2. It is incumbent upon United to establish the costs upon which its charges for interconnection are based and to have the burden of proving that the charges are reasonable and do not give United unwarranted competitive advantage. Under the Presiding Judge's interpretation of the issue, such evidence was not required for resolution of the issue. We are therefore unable to resolve the issue based on the evidence of record.

4. Accordingly, IT IS ORDERED, That the record IS REOPENED and that the proceeding IS REMANDED to the presiding Administrative Law Judge for further proceedings consistent with our opinion herein; and

5. IT IS FURTHER ORDERED; That such remanded proceedings be conducted on an EXPEDITED basis; and

6. IT IS FURTHER ORDERED, That the requests for oral argument filed by Carpenter Radio Company, Ohio Association of Radio Common Carriers, and the Chief, Common Carrier Bureau ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73R-84

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of VOICE OF REASON, INC. (KICM), GOLDEN, COLO. For Construction Permit	Docket No. 18710 File No. BP-18553

MEMORANDUM OPINION AND ORDER

(Adopted February 21, 1973; Released February 23, 1973)

BY THE REVIEW BOARD: BERKEMEYER, PINCOCK, AND KESSLER.

1. This proceeding involves the application of Voice of Reason, Inc. (KICM) (Voice of Reason) for authority to operate the former facilities of standard broadcast Station KICM, Golden, Colorado. In a decision, FCC 72R-299, 37 FCC 2d 686, 25 RR 2d 645, released October 20, 1972, the Review Board resolved unauthorized transfer of control, financial, misrepresentation, Rule 1.65 and *ex parte* issues adversely to Voice of Reason [1] and concluded that a grant of its application would not serve the public interest.[2] Now before the Board is a petition for reconsideration, filed November 20, 1972, by Voice of Reason,[3] wherein the applicant seeks a favorable determination of all of the specific issues. Petitioner's arguments as to each issue will be treated seriatim.

2. With respect to the unauthorized transfer of control issue, Voice of Reason contends that the Board's rejection of "substantial and uncontradicted evidence" upon which the Presiding Judge relied was "unlawful." That is, Voice of Reason argues, the Board has violated the substantial evidence doctrine and the principle set forth in *Office of United Church of Christ* v. *FCC*, —— U.S. App. D.C. ——, 425 F.2d 543, 16 RR 2d 2095 (1969), by rejecting evidence which was neither contradicted nor on its face incredible. Specifically, the applicant questions the Board's rejection of Voice of Reason's explanation that some $60,000 was borrowed by it for the purpose of placing the funds in an escrow account pending Commission approval of Voice of Reason's acquisition of KICM. Voice of Reason argues that uncontradicted evidence established that its president, Bill Beeny, and its

[1] The history of Voice of Reason's application, the Commission's grant of interim operating authority to Voice of Reason, and subsequent discontinuance of such authority is set forth in detail in para. 1 and the footnotes thereto of our Decision in this proceeding, and need not be restated here.

[2] In his Initial Decision, FCC 71D-12, released March 23, 1971, Administrative Law Judge Basil P. Cooper concluded that there had been no unauthorized transfer of control, but resolved the financial, misrepresentation, Rule 1.65 and *ex parte* issues unfavorably to the applicant and therefore denied its application.

[3] Also before the Board are an opposition, filed November 29, 1972, by the Broadcast Bureau, and a reply and correction of reply, filed December 11 and 12, respectively, by Voice of Reason.

attorney, Jerome Duff, signed escrow opening account cards. There was further evidence, Voice of Reason states, that the bank retained these cards and there was no testimony from Thomas Zelazny, the representative of the Federal Deposit Insurance Corporation (FDIC), which succeeded to the bank's assets and records, that these cards were not in the bank's records. Furthermore, Voice of Reason contends, the Board has improperly adopted non-record findings on the escrow matter by a Denver court adjudicating a suit brought by the FDIC against Voice of Reason, while at the same time implacably rejecting that court's findings on the question of consideration for the $60,000 loan. It is also the position of the applicant that the Board's conclusion that the consideration consisted of day-to-day control of the station is irrational because no benefit could conceivably be derived from control over a hopelessly mismanaged and financially weak station, compounded by no guarantee of transfer of legal title to the assets or rights to its license. Voice of Reason disputes the Board's alleged rejection of certain evidence relating to the indicia of retention of basic control by the licensee, and labels this alleged rejection as incredible. For example, Voice of Reason contends, such indicia as Norman's (the controlling member of the licensee) authority regarding format changes, correspondence between Norman and Barton, the station's manager, Barton's obedience to Norman with regard to possible sale of the station to another buyer, S. H. Patterson, and Barton's obedience generally, were improperly rejected by the Board. Voice of Reason is particularly critical of the Board's treatment of the Norman-Barton correspondence, arguing that the Board's interpretation of a previous Commission Order with respect to it was "manifestly erroneous" and that its rejection of this uncontradicted evidence was "legal error". In sum, Voice of Reason contends that the Board placed upon it "the insuperable burden of bringing in evidence negating every possible basis which the reviewing body might later conceive for distrusting the credibility of such evidence", and that the Board should more appropriately have remanded the proceeding to resolve credibility questions rather than reject evidence as incredible.

3. In its opposition, the Broadcast Bureau argues initially that Voice of Reason's petition for reconsideration is merely a repetition of its earlier arguments to the Board contained in its exceptions and made at oral argument and, on this basis alone, should be denied, citing *WWIZ Inc.*, 37 FCC 685, 686 (1964), affirmed *sub nom. Lorain Journal Company* v. *FCC*, 122 U.S. App. D.C. 127, 361 F.2d 824 (1965), cert. denied 383 U.S. 967 (1966); and *Cable TV Co.*, 33 FCC 2d 787, 23 RR 2d 990 (1972). However, with particular respect to the unauthorized transfer of control issue, the Bureau rejects Voice of Reason's contention that the Board's action was unlawful. The Board, the Bureau states, must study the Presiding Judge's reasoning and weigh the factors supporting and contradicting his conclusion, but may also draw its own inferences and reach its own conclusions, citing *Lorain Journal Company* v. *FCC*, *supra; Milton Broadcasting Company*, 34 FCC 2d 1036, 1047–48, 24 RR 2d 369, 383–84 (1972); and *Medford Broadcasters, Inc.*, 34 FCC 2d 989, 993, 24 RR 2d 359, 365 (1972). The Bureau points out that the Board disagreed with the Presiding Judge

basically because the latter failed to weigh all the record evidence in reaching his conclusions. Furthermore, the Bureau maintains, the evidence Voice of Reason labels as uncontradicted was in fact contradicted and was on its face incredible. As such, the Bureau concludes, this evidence could be accorded no weight, whereas the Board's conclusions are supported by record evidence as well as the inherent incredibility of Voice of Reason's contentions. In reply, Voice of Reason contends that its petition is not a mere reiteration of past arguments and that the Bureau does not cite any evidence contradicting that which the applicant claims was improperly rejected, or explain why the rejected evidence is on its face incredible.

4. The Board is of the view that Voice of Reason has presented no arguments or circumstances which would warrant reconsideration of our decision to deny its application under the unauthorized transfer of control issue. To begin with, as we indicated at para. 27 of our Decision, in *United Church of Christ*, *supra*, the Court of Appeals invalidated a Commission conclusion which was not grounded on substantial evidence basically because of the erroneous allocation of the burden of proof upon a public interest intervenor. Voice of Reason, as the applicant here, is not in a comparable position because it carried the burden of proof as well as the risk of non-persuasion. Contrary to Voice of Reason's contentions, this is not an "insuperable burden". For it is, in fact, the ordinary and customary burden faced by all applicants. (See para. 28 of our Decision.) Furthermore, the contention that the Board unlawfully rejected evidence which was uncontradicted and not on its face incredible, reflects a misreading of our Decision and is consequently, wrong on both counts. As shown by our Decision, the Board was essentially of the view that the Presiding Judge ignored or failed to give full consideration to numerous facts of record in resolving the unauthorized transfer of control issue. (See *e.g.*, paras. 3, 4, 15, 17 and 19, and note 13 of our Decision.) In reaching this conclusion, the Board acted in accordance with its legal responsibilities as set forth in principle and precedent cited at note 18 of our Decision, and by the Bureau in its opposition pleading. For example, and with reference to Voice of Reason's specific allegations, it was our view that the applicant's escrow account explanation strained credibility beyond its limit and could not be accepted. We relied upon evidence from the records of the Rocky Mountain Bank that the $60,000 loan funds, contrary to Beeny's explanation that they were being held in escrow, had in fact been distributed. (See para. 14 of our Decision.) Also, contrary to Voice of Reason's contention, Beeny's explanation and claims of innocence were in fact contradicted by substantial record evidence, including (a) his previous business experience and past exposure to escrow arrangements, (b) the presence of his attorney with him at the bank transaction, and (c) the absence from evidence of the allegedly signed escrow accounts cards or escrow agreement.[4] (See

[4] Voice of Reason's argument regarding Thomas Zelazny, the FDIC representative, is a non sequitur. To say that Zelazny did not testify that the escrow cards were not in the bank's records overlooks the point that he may not have been asked a direct question to that effect and could hardly be expected to volunteer such information otherwise. More important, however, the applicant again ignores the fact that it had the responsibility of introducing evidence necessary to dispel doubt or uncertainty.

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para. 15 of our Decision.) With respect to the consideration received for the $60,000, it was not the Board's judgment, as Voice of Reason implies, that the arrangement to obtain control over KICM was a wise one, but only that consideration (de facto control of the station) in fact existed. To the latter's existence, the record unmistakably and elaborately speaks. As set forth in detail at paras. 16–19 of our Decision, day-to-day operation and control over KICM passed to Beeny and Barton as consideration.[5] Again, contrary to the applicant's assertion, we did not ignore certain facts of record, such as the Norman-Barton correspondence, in reaching our conclusion, but in fact weighed all the evidence of record. Thus, with regard to the correspondence in question our Decision makes clear that we were relying on the content and the timing of the letters, and not on the Commission's prehearing judgment as to their probative worth. (See note 24 of our Decision.) Also, regarding the change in program formats, we did not, as the applicant states, reject this evidence as incredible, but in fact accorded weight to that particular incident of Norman's assertion of authority; however, we pointed out that this single incident was outweighed by numerous other incidents of record tending to prove that Voice of Reason had participated in an unauthorized transfer of control. (See para. 17 of our Decision.) Finally, as to the Patterson matter, this incident is not, alone or in combination with any other matters raised by Voice of Reason in its petition or in its previous pleadings, sufficient to overcome the overwhelming weight of evidence in this record that the applicant engaged in a premature transfer of control of KICM. (See para. 20 of our Decision.) [6]

5. With regard to the financial issue, Voice of Reason basically argues that the Board again based its conclusions on its disbelief of undisputed evidence. That is, Voice of Reason submits, the Board held that the applicant failed to document the availability and ownership of the assets it relied upon to meet first-year costs despite Beeny's affidavit and testimony that the assets were pledged to Voice of Reason's use by its affiliated organizations.[7] Voice of Reason concedes that an applicant's testimony as to the availability of loan funds must be corroborated, but argues that where, as here, applicant and lender are one and the same by reason of common control, such corroboration is *ipso facto* present. In addition, Voice of Reason contends that Gospel Revival Hour, one of its affiliated organizations, transferred to it an asset worth $128,000 (the Missouri Youth Ranch), and that during Voice of Reason's interim operation of KICM, the current assets of Gospel Revival Hour were made available to it. Further, Voice of

[5] With regard to the suit brought by the FDIC against Voice of Reason, we note that the applicant first brought the fact that a judgment had been rendered to the Board's attention at the oral argument held May 2, 1972. In that the suit is central to the Rule 1.65 issue, we took official notice of the judgment at note 11 of our Decision, and we also referenced to it elsewhere in the Decision, *e.g.*, notes 12 and 14. However, we reject as unfounded Voice of Reason's suggestion that we adopted or rejected some of the court's findings in lieu of our own. Our Decision clearly sets forth that our findings derive from the record compiled in this proceeding. (See paras. 3 and 4 of our Decision.)

[6] Apart from the fact that the applicant has at no time formally petitioned the Board for remand of the proceeding, it should be apparent that cause for remand does not arise from an applicant's failure to carry the burden of proof or to successfully resolve an issue in its favor.

[7] Voice of Reason alleges that the Board "sidestepped" its showing of expected revenues based on the past interim operation of KICM. In this connection, see note 8, *infra*.

Reason states, it was created by Freedom Baptist Temple for the purpose of acquiring a station, and the pledge of assets from the latter to it for this purpose is therefore believable. Voice of Reason also contends that (a) the Board imposed an "unprecedented burden" upon it by requiring that it document Freedom Baptist Temple's ownership of the assets on its balance sheet; and (b) neither the application form nor Commission precedent requires such documentation, in the applicant's view. Freedom Baptist Temple's ownership of its two largest assets, the Missouri Youth Ranch and the 320 acres of land in Warren County, Voice of Reason contends, were shown by documentary proof. Finally, Voice of Reason concludes that if the assets in question were indeed available to it, they would indisputably have sufficed to meet its financial requirements.

6. In its opposition, the Bureau argues that the record does not support Voice of Reason's contention that it is financially qualified. The only support Voice of Reason has for its contention, the Bureau states, are Beeny's self-serving statements. The record does show, the Bureau submits, that the assets listed on the applicant's balance sheets are not owned by it and that many of its liabilities are not reflected. As an example of what it considers to be the "absurdity" of Voice of Reason's balance sheet, the Bureau sets forth the history of one of the listed assets, the Missouri Youth Ranch, as follows: (1) the property was transferred from the Gospel Revival Hour to Voice of Reason on July 10, 1968; (2) on the same day, a deed of trust on the property was executed and, on July 12, 1968, was recorded in Warren County, Missouri; (3) in 1969, the Gospel Revival Hour was dissolved as a legal entity; (4) on April 15, 1970, Gospel Revival Hour conveyed the property to the Freedom Baptist Temple; (5) on September 11, 1970, Voice of Reason conveyed the property to Freedom Baptist Temple; (6) on September 16, 1970, Gospel Revival Hour conveyed the property to Freedom Baptist Temple. The Bureau concludes that it is impossible to ascertain from the record who owns the property. In reply, Voice of Reason claims that the Bureau's example of the Missouri Youth Ranch only goes to prove that the property was both available to Voice of Reason and was continuously owned within the "Voice of Reason family of commonly owned" organizations.

7. As shown by our Decision, it was and remains the Board's view that it was fundamental to the applicant's case that it establish beyond question the existence of its alleged pledge of assets from Freedom Baptist Temple. However, in our view, this was never done and the applicant's present arguments do not alter that conclusion. In spite of Voice of Reason's claim that the congregation of Freedom Baptist Temple approved the pledge, no substantiation by way of a record of the congregation's minutes, or its vote, or in any other form, was presented. Contrary to Voice of Reason's claim that Beeny's testimony is sufficient without more to establish the pledge, Section III of application Form 301 expressly requires a *written* copy of the agreement by which third persons are obligating themselves to furnish funds to the applicant. Moreover, there is ample Commission precedent that an applicant's uncorroborated testimony as to the availability of loan funds is insufficient to establish such availability. In our view, this

principle is equally applicable to Beeny's uncorroborated and self-serving testimony as to the availability of pledge funds. Furthermore, the relationship between Voice of Reason and Freedom Baptist Temple, the financial condition of Freedom Baptist Temple, the chain of title to the principal asset, the Missouri Youth Ranch, as well as many other questions, remain confused and uncertain, despite Voice of Reason's explanations. The situation with regard to the Ranch is particularly well set out by the Bureau in its opposition, and Voice of Reason's response that this history establishes continuous common ownership is simply inaccurate. (See notes 35 and 38 of our Decision.) Voice of Reason's burden under this issue was not "unprecedented" as it claims; it was to establish a clear, complete and accurate picture of its financial condition. Reference to a "family of commonly owned" organizations, without any convincing evidence to support this description, cannot overcome a confused, inaccurate and incomplete showing of the availability and ownership of the assets in question.[8] (See Section III of our Decision and particularly para. 34 thereof.) No additional clarification has been provided by Voice of Reason's petition for reconsideration and, therefore, no warrant exists for altering our conclusion that there has been a failure of proof under this issue.

8. With respect to the misrepresentation issue, Voice of Reason asserts that, although it did not report as a liability the $60,000 note it executed at the Rocky Mountain Bank, such failure could not justify a finding that Voice of Reason intended to conceal the existence of a valid obligation. Having never allegedly received value for the note, Voice of Reason contends it could not, under elementary accounting principles, have reflected the $60,000 as a liability. The same arguments, petitioner asserts, apply to its failure to reflect delinquent taxes on its balance sheet. No grounds exist in either case, Voice of Reason contends, for a conclusion that there was anything more than an honest mistake. Indeed, the applicant contends, the alleged disparity between the court in the FDIC suit and the Board as to the consideration for the note indicates that such a mistaken belief could occur.[9] Likewise, no element of deliberate deception attaches, Voice of Reason claims, to its failure to specify who owned the assets it was relying on. The assets were in the "family of closely related organizations", Voice of Reason states, so that technical ownership by another entity was immaterial.

9. In opposition, the Bureau states that the Board disposed of Voice of Reason's present contentions at para. 43 of the Decision, and that no repetition is therefore needed. Indicative of the applicant's attitude, the Bureau states, is that it still believes it may reflect an asset on the balance sheet but not a liability affecting that asset. In reply, Voice of Reason repeats its argument that the Board ignored evidence contrary to its own view of the facts, and alleges that the Bureau's comments miss the point. Voice of Reason also claims that in cases decided

[8] The Board did not "sidestep" or ignore Voice of Reason's claims of revenue and sufficiency of assets in its Ruling on Exceptions no. 31. Obviously, no decisional significance could attach to these matters if the applicant could not show that the balance sheets and assets contained thereon were theirs to begin with.

[9] Voice of Reason alleges that there is no requirement in the application form or elsewhere for apprising the Commission of the FDIC suit.

subsequent to the Board's Decision herein, the Board held that the mere failure to report a pending civil suit is not in itself disqualifying, at least if the suit does not affect the applicant's financial qualifications, citing *Centreville Broadcasting Company*, FCC 72R–330, 38 FCC 2d 27, released November 20, 1972, and *Azalea Corporation*, FCC 72R–336, 38 FCC 2d 95, released November 24, 1972. Finally, petitioner argues that, in the Ruling on Exception no. 31, the Board ignored Voice of Reason's alleged showing that it could meet first-year costs even if it were liable on the $60,000 note.

10. Certain of Voice of Reason's arguments, *e.g.*, that the Board has rejected unrebutted evidence, and that the Ruling on Exception no. 31 ignored the financial showing, are merely repetitive of arguments dealt with earlier and, as such, warrant no further discussion.[10] The essence of Voice of Reason's deficiency under the misrepresentation issue is that the bulk of the assets listed by it on the balance sheet submitted with its application were not its own, but belonged to Gospel Revival Hour. Furthermore, neither this fact, nor the relationship for purposes of the application between the two entities, including any reference to Gospel Revival Hour, nor the alleged existence of a pledge of the assets from one to the other organization, were explained or disclosed in the application or the financial amendment thereto. Voice of Reason's present arguments do not ameliorate these shortcomings. The same failure of proof which attached to the asserted pledge from Freedom Baptist Temple is presented here. As the Bureau notes, the applicant's arguments with respect to the disputed liabilities were answered at length in para. 43 of our Decision. It bears repeating, however, that the applicant could easily have listed the debts and noted the dispute instead of not listing them at all; and, we still find it to be seriously misleading, in the case of the $60,000 note, for the applicant to list the property as an asset but to ignore the encumbrance. Finally, Voice of Reason's position with respect to the Rule 1.65 issue is not aided by the recent precedent it cites. This issue derives from the applicant's failure to report the FDIC suit against it for the balance of the $60,000 note. Both of the cases relied on make clear that the necessity to report lawsuits, pursuant to Rule 1.65, depends upon their potential decisional importance. In *Centreville Broadcasting Co., supra*, we said ". . . an applicant must report those suits which may be of decisional significance", quoting *Folkways Broadcasting Co., Inc.*, FCC 71R–63, 21 RR 2d 211, 215 (1971). The suits in question in *Azalea* and *Centreville* could have had no effect on the applicants' financial qualifications. In our Decision in this case, we expressly determined at para. 44 that the FDIC suit had direct bearing on Voice of Reason's financial qualifications. As such, it was clearly germane and should have been reported. (See note 41 of our Decision, and note 11 of *Azalea Corp., supra.*)

[10] In fact, Voice of Reason's argument under the financial and misrepresentaiton issues that the Board almost completely disregarded findings made by the Presiding Judge because of the Board's doubts as to credibility, ignores the plain language of our Decision. As we clearly stated at paras. 2, 3 and 35 of our Decision, unlike the unauthorized transfer of control issue, we found the Judge's findings on the other issues to be substantially accurate and, accordingly, we adopted them for the most part.

11. Finally, with regard to the *ex parte* issue, Voice of Reason contends that the communications solicited by Beeny to the Commission were specifically addressed to the termination of its interim operating authority which was not a restricted or adjudicatory proceeding. Voice of Reason submits that the fact that the Commission designated its application for hearing at the same time did not change the nonrestricted character of the interim operation proceeding. The applicant also claims that the Board has misunderstood its argument and has arbitrarily construed the *ex parte* rules. This is true, argues Voice of Reason, because termination of its interim authority was "doubtlessly" made on the basis of *ex parte* presentations to the Commission by the Broadcast Bureau. This is unfair and inconsistent application, petitioner contends, and, in any event, there was no willful intent to violate the rules on its part. In opposition, the Bureau briefly states that Voice of Reason's arguments are the same as those presented earlier and, as such, were adequately disposed of in para. 48 of the Board's Decision. In reply, Voice of Reason argues once more that the Board rejected uncontested evidence in resolving this issue and ignored its position with respect to the applicability of Rule 1.1203(a).

12. The Board agrees with the Bureau that Voice of Reason is only restating arguments previouly dealt with in our Decision. Contrary to Voice of Reason's claim, we set forth its major contention in the second sentence of para. 48 of our Decision. Thereafter, we explicitly made clear in a step-by-step analysis how Beeny's actions constituted solicitations of impermissible communications. It was and remains our view that Beeny's letter, following the Commission's denial of Voice of Reason's reconsideration petition, was a direct appeal to his listeners to protest designation of Voice of Reason's application for permanent operating authority for hearing. This was not an arbitrary conclusion, but was based on the facts and our analysis as contained in paras. 45–48 of our Decision. We also perceive no prejudicial application of the *ex parte* rules to Voice of Reason. In our view, the applicant misunderstands the Bureau's investigatory role. As such, this claim of prejudice has also been dealt with in our Decision generally in Section II thereof, and particularly at para. 24. Finally, with respect to the argument that the rules were not willfully violated, we point out, as we did in para. 48 of our Decision, that Voice of Reason did not establish that inadvertence, good faith or innocence attached to Beeny's actions. In short, reconsideration of our determination under the *ex parte* issue, as with the other issues, is unwarranted.

13. Accordingly, IT IS ORDERED, That the petition for reconsideration, filed November 20, 1972, by Voice of Reason, Inc. (KICM), IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-207

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

In Re Application of SAMUEL L. ROSENBERGER AND RICHARD C. ROSENBERGER, D.B.A. WAUCHULA BROADCASTING CO. (ASSIGNOR) and BARCO, INC. (ASSIGNEE) For the Assignment of the License of Station WAUC, Wauchula, Fla.	File No. BAL-7440

ORDER

(Adopted February 21, 1973; Released February 27, 1973)

BY THE COMMISSION:

1. The assignee is fully qualified.

2. The license was assigned to the assignor by grant of September 24, 1969 (BAL-6692) and the subject application was filed October 4, 1971. Therefore, the application is governed by the Commission's "Three Year Rule", Section 1.597.

3. The application proposes an assignment of Station WAUC to Barco, Inc., a new corporation. The assignors are 50% stockholders of this corporation. The other 50% belongs to Georgia M. Brush (25%) and Jerald A. Brush (25%). The Brushes are the licensees of Station WPRV, Wauchula, which is currently silent. On the closing date, the Brushes will surrender the license for WPRV to the Commission. The essence of this transaction is that the Brushes are paying one dollar plus $22,000 worth of WPRV assets for 50% of Station WAUC. The Rosenbergers bought the station in 1969 for $65,000. For the past several years, neither Station WAUC nor Station WPRV has been profitable. Assignors state that the circumstances have changed in that Wauchula cannot support more than one radio station. They believe that the public interest is better served by having one strong station in Wauchula rather than two weak ones. Wauchula's population is 3,007. It is located in Hardee County, Florida which has a population of 14,889. There is no evidence of trafficking in broadcast licenses. In view of these circumstances, a hearing based on the Commission's "Three Year Rule" is not indicated.

4. The assignee is fully qualified and a grant of this application will serve the public interest, convenience and necessity. Therefore, the above application IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73R–79

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of WIOO, INC., CARLISLE, PA.	Docket No. 19468 File No. BPH–6572
HOWARD J. HILTON, JOHN E. McGOWAN, AND JOHN E. HILTON, DOING BUSINESS AS HILTON, McGOWAN & HILTON, CARLISLE, PA.	Docket No. 19469 File No. BPH–6631
ALEXANDER CONTRACT AND SYLVIA CONTRACT D.B.A. CUMBERLAND BROADCASTING CO., CARLISLE, PA.	Docket No. 19471 File No. BPH–7404
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted February 14, 1973; Released February 22, 1973)

BY THE REVIEW BOARD: BOARD MEMBER BERKEMEYER ABSENT.

1. Before the Review Board is a petition to enlarge issues, filed October 6, 1972, by WIOO, Inc. (WIOO), requesting the addition of the following three issues against Cumberland Broadcasting Company (Cumberland): (a) to determine the basis of Cumberland's representations that land would be available to it on the basis of an annual lease of $500.00; (b) to determine whether Cumberland had been guilty of misrepresentation and concealment in connection with the costs involved in its use of the land proposed for its transmitter site; (c) to determine whether Cumberland has correctly represented all of the facts and circumstances surrounding the proposed loan from Donald C. Hartman in its application as originally filed, and in its pleadings submitted in response to petitions to enlarge issues filed by WIOO.[1] [2]

2. In support of requested issues (a) and (b), WIOO alleges that Cumberland is guilty of misrepresentation and concealment in connection with the cost of the land necessary for its proposed transmitter site. WIOO points out that the Cumberland application as originally filed represented that the land necessary for the trans-

[1] Also before the Review Board are the following related pleadings: (a) motion to file supplement, and supplement to petition to enlarge issues, filed October 13, 1972, by WIOO; (b) Broadcast Bureau's comments on (a), filed October 18, 1972; (c) opposition, filed October 19, 1972, by Cumberland; (d) Broadcast Bureau's comments, filed October 26, 1972; (e) reply, filed October 30, 1972, by WIOO; and (f) petition for leave to file, and supplement to opposition, filed November 28, 1972, by Cumberland.

[2] The Board is of the view that petitioner has not shown good cause for the late filing of its motion to enlarge. The Board, will however, consider the request on the merits since the allegations raise serious questions regarding Cumberland's basic qualifications and since the petition to enlarge was filed within four days after Mr. Swidler received the option agreement. See Note 3, *infra*. *The Edgefield-Saluda Radio Co. (WJES)*, 5 FCC 2d 148, 8 RR 2d 611 (1966).

mitter site was available to it on the basis of an annual lease of $500 and this representation was repeated in a subsequent amendment. However, petitioner asserts that the only arrangement for use of the land was a cash purchase in the amount of $9,000.00 for a five-acre plot.[3] Petitioner claims that if the actual cost of the land had been disclosed in the original application, a serious question would have arisen concerning Cumberland's financial qualifications.[4] Next, in support of its requested issue (c), WIOO alleges that Cumberland misrepresented its relationship with Hartman in the original filing. Petitioner contends that Alexander Contract had promised Hartman an ownership interest in Cumberland and the position of manager of the proposed station in return for Hartman's promise to lend Cumberland $20,000 and that Cumberland's application should have disclosed this interest. In support, WIOO submits an affidavit from Hartman indicating that it was in late 1970 when he was offered the position of manager and the ownership interest in consideration of his loan commitment. Petitioner also submits a telegram dated October 6, 1972, in which Hartman states that he made the loan agreement solely because of this offer of ownership and employment.[5] Petitioner further requests the Review Board to review its previous ruling and enlarge the issues to permit a full inquiry with respect to all of Cumberland's past and present proposals to finance its construction and operation.[6] The Broadcast Bureau supports addition of the requested issues.

3. In opposition, Cumberland claims that the mistake in regard to the transmitter site was an honest human error and disclaims any intent to mislead the Commission. In an affidavit attached to the opposition, Contract posits as a possible explanation for the mistake the fact that he had discussed with his attorneys a proposed leasing arrangement for another site, which never came to pass.[7] With respect to the Hartman loan, Cumberland maintains that the possible ownership interest of Hartman was a thing of the past at the time the Cumberland application was filed and denies any hidden ownership

[3] Submitted in support of its allegation is an affidavit from Harold Swidler which states that Thomas Boylan indicated to Swidler that in March of 1971, he and his wife entered into an agreement with Alexander and Sylvia Contract pertaining to the said property. In addition, petitioner submitted a copy of the option agreement between the Contracts and Mr. Boylan.

[4] WIOO asserts that Cumberland relied in its original filing on total available resources in the amount of $128,445 and its total first year's cash requirements were $127,315, leaving a cushion of slightly more than $1,000; therefore, an expenditure of $9,000 for five acres of land would have resulted in a deficit of approximately $7,870.

[5] On October 13, 1972, WIOO filed a supplement to its petition to enlarge issues containing an affidavit of Hartman substantiating the facts set forth in his telegram. The Board agrees with the Bureau that the supplement does not violate the Board's notice of October 11, 1972, regarding "the filing of successive supplements long after the initial interlocutory pleading was filed", and therefore will accept the supplement.

[6] WIOO has previously requested issues inquiring into the three loan commitments originally relied upon by Cumberland but the Review Board in a Memorandum Opinion and Order, FCC 72R–255, 37 FCC 2d 342, released September 20, 1972, denied the requested issues. One of the requested issues concerned the circumstances surrounding the proposed loan from Donald C. Hartman. The Board has recently, however, specified an issue to determine whether Cumberland misrepresented the terms and conditions of a loan commitment from James Line (FCC 73R–69, — FCC 2d —, released February 9, 1973).

[7] Cumberland's petition for leave to file a supplement to its opposition will be denied. The Board stated in its Public Notice No. 90836, released October 11, 1972 (Filing of Supplemental Pleading Before the Review Board) that it would closely scrutinize all alleged justifications for the filing of supplemental pleadings. Cumberland's request to supplement its opposition comes more than a month after the filing of its initial opposition and Cumberland has not satisfactorily explained the delay nor why it did not include this material in its initial opposition.

or other misrepresentation on the part of Cumberland. Submitted in support of its contention is a telegram from Hartman, dated October 18, 1972, to the effect that he had no ownership interest or promise of ownership interest in Cumberland after the application was filed.[8] As to the requested issues concerning Cumberland's proposals for financing its construction and operation, the applicant maintains that the Review Board has already ruled on these issues and is precluded from reconsidering its interlocutory rulings by Sections 1.102(b)(2) and 1.106(a).

4. The Review Board will add requested issues (a) and (b). We believe that a substantial question has been raised with respect to whether Cumberland has misrepresented and concealed facts in connection with the costs involved in its use of the land proposed for its transmitter site. In our view, Cumberland has not successfully negated the allegation of willful misrepresentation, especially in view of the fact that a substantial question as to Cumberland's financial qualifications would have been raised if the actual cost of the land had been disclosed in the original application. Furthermore, the alleged misrepresentation was repeated in an amended financial statement submitted on June 13, 1972. Therefore, the Board will add an appropriate issue to permit a full inquiry of this matter at the hearing. The Board is of the opinion, however, that addition of requested issue (c) relating to the Hartman loan is not warranted. We have no reason to doubt the statement of Hartman, affirming the affidavit of Contract, that he had no ownership interest or promise of ownership interest in Cumberland after the application was filed. Therefore, Cumberland has, to our satisfaction, adequately answered the petitioner's allegation that Cumberland misrepresented its relationship with Hartman in the original filing. Furthermore, we do not believe that the statements contained in the affidavits and telegrams from Hartman are conflicting. Hartman originally stated that in late 1970 he made the loan agreement solely because of the offer of ownership and employment but circumstances changed and by March, 1971, when the application was filed, Hartman no longer had any interest in participating in the business in any capacity. Petitioner's belief that the loan is "simply incredible" is conjecture and not supported by sufficient allegations of fact to permit a full inquiry concerning the circumstances surrounding the proposed loan from Hartman.[9] The requested issue concerning the Hartman loan will therefore be denied.

5. Accordingly, IT IS ORDERED, That the motion to file supplement to petition to enlarge issues, filed October 13, 1972, by WIOO, Inc., IS GRANTED, and the supplement IS ACCEPTED; and

6. IT IS FURTHER ORDERED, That the petition for leave to file, filed November 28, 1972, by Cumberland, IS DENIED; and

[8] Hartman's telegram corroborates the affidavit of Contract attached to the opposition.

[9] Moreover, the Review Board has already considered and denied such a requested issue. See Memorandum Opinion and Order, FCC 72R–255, *supra*. The Board will also deny the requested issues inquiring into Cumberland's past and present proposals to finance its construction and operation, since no allegations sufficient to warrant such an issue have been presented. However, see note 6, *supra*.

7. IT IS FURTHER ORDERED, That the petition to enlarge issues, filed October 6, 1972, by WIOO, Inc., IS GRANTED to the extent herein indicated, and IS DENIED in all other respects; and

8. IT IS FURTHER ORDERED, That the issues in this proceeding ARE ENLARGED by the addition of the following issues:

(a) To determine the basis of Cumberland's representations in its application and amendments thereto that land would be available to it on the basis of an annual lease of $500.

(b) To determine whether Cumberland had misrepresented or concealed facts in connection with the costs involved in its use of the land proposed for its transmitter site.

9. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence under the issues added herein SHALL BE on WIOO, Inc., and the burden of proof thereunder SHALL BE on Cumberland Broadcasting Company.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72D–79

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of WNER RADIO, INC., LIVE OAK, FLA. For Construction Permit	Docket No. 18975 File No. BPH–6858

APPEARANCES

E. Theodore Mallyck, Esq., on behalf of WNER Radio, Inc.; and *Earl C. Walck* and *Joseph Chachkin, Esqs.*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE ISADORE A. HONIG

(Issued December 22, 1972; Effective February 21, 1973, Pursuant to Section 1.276 of the Commission's Rules)

PRELIMINARY STATEMENT

1. This proceeding involves the application of WNER Radio, Inc. ("WNER") for an FM radio station in Live Oak, Florida, to operate on Channel No. 251 (98.1 Mc/s), with power of 50 KW. Originally the WNER application was designated for comparative hearing with the competing application of Live Oak Broadcasting Company ("Live Oak") by order of the Commission (FCC 70–932) released September 3, 1970. In addition to the inclusion of the standard comparative issue, a financial qualifications issue was specified with respect to WNER and a *suburban* programming issue (ascertainment of needs) was specified with regard to Live Oak. A prehearing conference was held on October 22, 1970, and hearing sessions to receive evidence on the WNER financial issue and the comparative issue were held on December 1, and December 22, 1970.[1a] The record was left open pending Review Board action on an enlargement petition filed by WNER seeking additional issues against Live Oak. However, pursuant to arrangement made on December 22 for post-hearing submissions by the parties, proposed findings of fact and conclusions on the original issues were filed by each of them in the latter part of March 1971.[1]

2. By order of the Review Board (FCC 71R–83) released March 12, 1971, the issues in the proceeding were enlarged by the addition of certain character qualification issues concerning Live Oak. These issues grew out of charges against a principal of Live Oak before the Florida State Insurance Department. Hearing on the new issues was held on June 15 and 16, and July 30, 1971. The record was closed on the last-

[1a] Evidence on the *Suburban* Issue was also presented.
[1] Live Oak did not file proposed findings of fact and conclusions on the WNER financial issues.

mentioned date. Supplementary proposed findings and conclusions on these issues were filed by Live Oak on September 10, 1971 and on the same date WNER filed a statement in lieu of proposed findings and conclusions. On October 1, 1971, the Broadcast Bureau filed a request for the postponement of its submission of proposed findings and conclusions, and indicated that the Florida Department of Insurance was in the process of instituting new charges against a principal of Live Oak arising out of his activities as an insurance agent. By an order released October 6, 1971, the Bureau's request was granted and the filing date for its post-hearing submission on the added issues was postponed indefinitely. New charges against the Live Oak principal were filed by the Insurance Commissioner of Florida on January 31, 1972, after which the presiding judge in this proceeding ruled (FCC 72M–461) on April 6, 1972, that the existing issues did not encompass those charges. Meanwhile, WNER filed on March 20, 1972, a motion to further enlarge issues based on the developments before the Florida State Insurance Agency.

3. On April 18, 1972, Live Oak filed a petition for leave to amend its application to reflect the withdrawal as stockholder with a one-third interest of its principal whose activities as insurance agent led to the inclusion of additional issues against this applicant. A further petition for leave to amend was filed by Live Oak on May 10, 1972 for the purpose of showing that its financial proposal would not be impaired by the withdrawal of the stockholder mentioned above. By memorandum opinions and orders (FCC 72M–758 and FCC 72M–784, respectively), released June 12 and June 14, 1972, the amendatory petitions of Live Oak were granted. By orders released June 20, 1972, the filing of appeals by WNER from the orders permitting the amendments was allowed. Appeals were then filed by WNER on June 27, 1972. On July 19, 1972 and September 12, 1972, WNER also filed petitions for further enlargement of the issues.

4. On November 2, 1972, Live Oak filed a petition for dismissal of its application without reimbursement. By an order (FCC 72M–1458) released November 27, 1972, the application of Live Oak was dismissed with prejudice and the WNER application was retained in hearing status for issuance of an Initial Decision thereon.[2]

5. In consequence of the dismissal of the Live Oak application the following issues concerning WNER's application are left for consideration:[3]

> 1. To determine the amount required by WNER Radio for construction and first-year operation of its proposed station without reliance on revenues and the availability of the necessary funds to WNER Radio to thus demonstrate its financial qualifications.
>
> 2. To determine, in the light of the evidence adduced pursuant to the foregoing issue, whether the application of WNER Radio for construction permit should be granted.

[2] By its order (FCC 72R–354) released December 5, 1972, the Review Board dismissed the pending appeals and enlargement petitions of WNER as having become moot.

[3] See Commission's order of designation (FCC 70–932) released September 3, 1970 at p. 2 (Issues numbered 1 and 4).

Findings of Fact

CORPORATE ORGANIZATION OF WNER RADIO, INC.

6. Norman O. Protsman, 80% stockholder in WNER Radio, Inc. is the president and a director of this applicant. George R. Day, Jr., 10% stockholder in WNER, is the vice-president, secretary, treasurer and a director thereof. Clarence S. Parker and William M. Savitz each own a 5% stock interest and both are directors (WNER Ex. 2).

FINANCIAL QUALIFICATIONS

A. Construction and operating costs through first year of operation

7. The proposed FM station will be operated in conjunction with the applicant's existing AM station WNER, and the AM station personnel will take on additional duties of operating the FM station without any added compensation during the first year of FM operation (WNER Ex. 1, p. 1). The AM staff consists of six full-time and two part-time employees. The top four staff personnel of WNER, each employed full-time, own 100% of its stock (WNER, Ex. 1–C). WNER would also engage either one full-time man and one part-time man, or three part-time men, to handle on-the-air work and to assist in sales and programming for the FM station (*Ibid.*).

8. The functions of the AM staff and their additional FM duties are as follows:

Norman O. Protsman, President, Supervisor over-all operation. Assists in sales and public relations. Additional FM duties same as above, plus engineering duties.

George R. Day, General Manager, Directly responsible for over-all operation. Directs and supervises sales, news, programming, public affairs and traffic. Very active in sales, also has some announcing duties. Additional FM duties will include direction of both operations.

Clarence S. Parker, Engineer-Announcer, Responsible for equipment maintenance. Key on-air announcer. Also assists in sales and commercial production. Additional FM duties will include being responsible for over-all equipment maintenance, and participation in sales and commercial production.

William M. Savitz, Salesman Announcer, Main responsibility is sales and commercial production. Announcing 1-hour per day, plus 2 major newscasts. Helps with Programming Department. Additional FM duties will include sales, commercial production, and announcing.

Charles Hunter, News Director-Announcer, Main responsibility is gathering and writing news. Does 2½ hours of anouncing plus commercial production. Additional FM duties will include all of the above plus additional announcing duties.

Brenda Thomas, Secretary-Traffic Director, Main responsibilities include preparing daily log. Station billing and bookkeeping. Additional FM duties will include all of the above.

Fred Glass, Part-time announcer, main responsibilty is working on weekends. Additional FM duties will include evening work during the week.

Robert Stamper. Part-time announcer, main responsibility is afternoon and evening and weekend on-air work. Additional on-air work and possibly full-time employment to help with news, programming, and commercial production with FM (WNER Ex. 1-c).

9. WNER has a proposal from Capital Leasing Corporation for the leasing of FM station equipment (transmitting equipment; monitor equipment; FM antenna and transmission line, including installation; tower equipment; and studio technical equipment). The lease arrangement would run for a period of 84 months, with an option to purchase at the end of the lease period for $2,300. The leasing cost, based on $23,000 of equipment, will be $411.00 per month, with the 12 first-year payments amounting to $4,932.[4]

10. Other costs to be incurred and requiring cash payment during construction and first year's operation of WNER's proposed station will be as follows (WNER Ex. 1, p. 2):

Shipping costs and installation charges for FM equipment not covered by lease.	$400
Additional FM studio equipment	1,000
FM audio proof	200
FM replacement tubes and parts, and FM equipment maintenance	400
Additional electrical power costs for FM transmitter	1,600
Additional FM music library and license expense	1,000
Additional FM accounting expense	150
Additional FM insurance and tax expense	750
Additional FM office supplies	200
Additional FM salaries	12,000
Other FM pre-air expenses	500
Other FM operating expenses	4,500
Total costs (exclusive of equipment lease payments)	22,700

B. Availability of funds

11. To meet its cash requirements, WNER has a loan commitment for $30,000 from the First National Bank of Live Oak. No payments on the loan principal or interest will be due until the beginning of the 15th month of the loan. Allowing for a 60-day construction period for the FM station, the applicant will not be obligated to make interest or principal payments, until after the first year of station operation. The loan will then be amortized over a period of five years in equal quarterly payments with the first payment to include the interest due for the first fifteen months. The note for the loan is to be personally endorsed by Norman O. Protsman, the majority stockholder of WNER.[5] As required by the lender, Mr. Protsman has agreed to personally endorse the note of WNER to the bank as collateral for the $30,000 loan (WNER Ex. 1–E).

[4] WNER Exhibits 1–A and 1–B show the leasing arrangement and the equipment to be furnished thereunder by Capital Leasing Corporation. Based on the costs detailed above and the equipment lease payments totaling $4,932 for the first year of operation, the total cash requirements of WNER for its proposed FM station through the end of the initial year of operation will be $27,632.

[5] The loan commitment and its terms are shown by WNER Ex. 1–D.

CONCLUSIONS

12. The sole evidential issue in this proceeding requires determination of: (1) the amount required by WNER for construction and operation of its proposed station through the first year without reliance on revenues; and (2) the availability of the necessary funds to meet initial construction and first year operating costs. The findings establish that WNER will require $27,632 to construct and operate the proposed FM station for one year. The FM station will be operated in conjunction with WNER's existing AM station in Live Oak and the AM station employees will construct and operate the FM station for the first year without additional compensation. The applicant expects to hire more personnel to handle on-air work and to assist in sales and programming. The estimate of operating costs provides for this augmentation in staff.

13. To meet the cash requirement stated above, WNER has available to it the proceeds of a $30,000 loan from the First National Bank, located in Live Oak. As required by the Bank, Norman O. Protsman, WNER's majority stockholder, has agreed to personally endorse the note to be furnished to the bank.

14. Since WNER has demonstrated that it will have available to it from a bank loan cash in an amount that will be more than sufficient to meet expenses through the first year of operation, it is concluded that the applicant is financially qualified. Since the Commission has found in its designation Order that WNER is qualified in all other respects to construct and operate its proposed station, it is further concluded that the public interest would be served by grant of the WNER application under consideration.

In view of the foregoing, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party or the Commission reviews the Initial Decision on its own motion, in accordance with the provisions of Section 1.276 of the Rules, the application of WNER Radio, Inc., for a new FM radio station to operate on Channel 251 at Live Oak, Florida, IS GRANTED.

ISADORE A. HONIG,
Administrative Law Judge,
Federal Communications Commission.